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in the
Supreme Court
of the
United States

NO. 71-1505

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, et al., as and constituting the members of the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT FUND and the BOARD OF EDUCATION of the State of Florida,

Petitioners,

vs.

AEROJET-GENERAL CORPORATION,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO SUPPLEMENTAL BRIEF OF PETITIONERS

The parties to this proceeding will be referred to as they were in the Reply to Petition for Certiorari previously filed. References to the Petitioners' Supplemental Appendix to their Reply to the Brief of Respondent will be prefaced by the letters "SA". References to Respondent's Supplemental Appendix attached hereto will be prefaced by the

letters "RSA".[1] All emphasis herein is supplied unless otherwise indicated.

Petitioners have incorporated in their Reply to the Brief of Respondent a "Supplemental Brief"[2] purportedly filed under the authority of Rule 24(5) of the Rules of this Court.[3] By this device, Petitioners would mislead this Court into believing that a mandamus action just instituted by Metropolitan Dade County (hereinafter "the County") against the Trustees in the Florida Supreme Court has brought before the Florida Court for decision one of the precise questions of state law which the Petitioners say was erroneously decided in the present case by the United States Court of Appeals for the Fifth Circuit (hereinafter "Court of Appeals"). An examination of this lately filed mandamus action will demonstrate that it can have no bearing on this case. Petitioners' "Supplemental Brief" does not present any basis for granting certiorari, or for delaying disposition of this case.

The institution and conduct of the mandamus action, and the attempt to use the mandamus action in connection with this lawsuit, are the Petitioners' latest ploys to frustrate or sabotage the orderly progress of this lawsuit. After Petitioners' applications for stay in this case were denied by the Court of Appeals and Circuit Justice Powell,

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[1]The appendix references are different from those appearing in the Petition and Reply. The appendix references here are only to matter submitted in conjunction with Petitioners' supplemental brief.

[2]pp. 21-25 of Petitioners' Reply Brief.

[3]It provides:

"Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

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Petitioners began casting around for new courts and new ways to avoid obeying the orders of this Court, the Court of Appeals and the District Court. The result was a mandamus action brought by the County against the Trustees[4] on the theory that the Trustees had a ministerial duty to offer certain of the lands to the County before conveying to Respondent. This contention is bottomed on a Florida Statute enacted in 1965, four years after the Lease-Option involved herein, the text of which is set out below.[5] The County has demanded to be offered this property under the statute, but the County has not alleged that it could meet the statutory purchase requirements. (RSA 1-6).

[4]The Board of Education was not joined in the mandamus action for reasons which will appear.

[5]§253.111, *Fla.Stats.* (1971), applies only to the Trustees, not to the Board of Education:

> 253.111 Notice to board of county commissioners before sale.—The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes on the following terms and conditions:
>
> (1) If an application is filed with the board requesting that they sell certain land to which they hold title and the board shall decide to sell such land or if the board shall, without such application, decide to sell such land the board shall, before consideration of any private offers, notify the board of county commissioners of the county in which such land is situated that such land is available to such county. Such notification shall be given by registered mail, return receipt requested.
>
> (2) The board of county commissioners of the county in which such land is situated shall, within ninety days after receipt of such notification from the board, determine by resolution whether or not it proposes to devote such land to public parks, public beaches, public fishing piers, public boat ramps, public dockage facilities or other public outdoor recreational purposes, hereinafter referred to generally as public outdoor recreational purposes.

The Petition for Writ of Mandamus was filed on June 9, (RSA. 1-6) and on the same day the Trustees consented in writing to the issuance of an alternative writ of mandamus. (SA. 8). An alternative writ issued from the Florida Supreme Court commanding the Trustees to offer the lands to the County for sale or to show cause for

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(3) If the board of county commissioners shall determine that it proposes to devote such land in perpetuity to public outdoor recreational purposes it shall adopt a resolution specifying such determination and setting forth:

(a) The specific public outdoor recreational purpose or purposes to which it proposes to devote such land;

(b) A tentative plan of development for such land;

(c) A tentative time schedule of development, which tentative time schedule shall set a date of commencement of development not later than two years after the date of such resolution and a date of conclusion of development not later than four years after the date of such resolution.

A certified copy of such resolution shall be furnished to the board within such ninety day period by registered mail, return receipt requested.

(4) If the board of county commissioners determines that it does not propose to devote such land to public outdoor recreational purposes it shall notify the board of such determination by sending, immediately after adoption, a certified copy of the resolution so specifying to the board by registered mail, return receipt requested. If the board of county commissioners shall fail to act as provided in subsection (3) within the ninety day period, such failure shall constitute a determination that it does not propose to devote such land to public recreational purposes.

(5) If the board receives within the ninety day period the certified copy of the resolution provided in subsection (3), the board shall forthwith convey to the county such land upon such terms and conditions and at such price as the board shall determine (but in no case at a price higher than such property would be disposed of under any other provision of this chapter), but subject to a reverter to the board if such land shall not be devoted to the public outdoor recreational purpose or purposes specified in such resolution in substantial accordance with the plan of development and the time schedule for development set forth in such resolution, and shall not be devoted in perpetuity to some public purpose.

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not doing so by July 5, 1972. (SA. 2-7). The Trustees quickly went to the District Judge with this alternative writ to which they had consented, and pleaded for stay of the specific performance judgment herein. The District Judge denied the renewed request for stay, after the parties submitted legal memoranda and oral argument. (RSA. 7). Thereafter, the Trustees refused to comply with the judgment and the District Court appointed a commissioner to convey the lands, as authorized by Rule 70, *F.R.C.P.* (SA. 29-31). The lands held by the Trustees and by the Board of Education were conveyed to Respondent in fee simple on June 20, 1972. (SA. 33-36).

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(6)(a) If the board of county commissioners shall determine that it does not propose to devote the land to public outdoor recreational purposes the board may dispose of the property as otherwise provided in this chapter.

(b) It shall not be a violation of the reverter clause of any deed from the board to a county under this section if the county shall in fact use the property for a public outdoor recreational purpose other than that specified in the resolution provided in subsection (3) or not in substantial accordance with the plan of development and time schedule set forth in such resolution if the board shall by appropriate resolution approve such change or such failure to act in substantial accordance with the plan of development or time schedule.

(c) Nothing in this section shall restrict any right otherwise granted to the board by this chapter to convey land to which they hold title to the state or any department, office, authority, board, bureau, commission, institution, court, tribunal, agency or other instrumentality of or under the state. The word land as used in this act means all lands vested in the board of trustees of the internal improvement trust fund.

(7) If any riparian owner shall exist with respect to any land to be sold by the board, such riparian owner shall have a right to secure such land, which right shall be prior in interest to the right in the county created by this section, provided that such riparian owner shall be required to pay for such land upon such prices, terms and conditions as determined by the trustees. Such riparian owner may waive this prior right in which case this section shall apply.

History.—§1, ch. 65-324; §§27, 35, ch. 69-106.

Respondent was not a party to the mandamus proceeding brought by the county, and Respondent has not been added as a party to date.[6] In fact, due to the initiation and conduct of this "sweetheart" mandamus action between parties whose sole objective was not to litigate with each other but to impair Respondent's rights, Respondent deemed it necessary to institute action for declaratory adjudication of the County's position, and this was done. (SA. 20-27; RSA.).[7] Prayer has been made in Respondent's pending declaratory judgment action for such injunctive relief against the conduct of the mandamus or institution of other proceedings as is necessary and proper under 28 *U.S.C.* §2283. (SA. 27; RSA. 9-45).

Petitioners are misleading this Court when they say that the Florida Supreme Court has before it in the County's mandamus proceedings the issue of Trustees' power to enter into the Lease-Option with Respondent. While the County *has alleged* in its Petition for Alternative Writ of Mandamus that the Trustees had no power to grant the option, this is an allegation which no lawyer would find necessary to make *if the lawsuit was a bona fide attempt to compel the offering of the property to the County for sale.* Mandamus lies only to compel the performance of a ministerial duty;[8] the County alleges in its petition that a

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[6]Both the County and Trustees have attempted to join Respondent, but these efforts were timely opposed. (RSA. 46-85). The Florida Supreme Court recessed without ruling on the joinder issues.

[7]Respondent filed that action on June 20, 1972, the same day the deed was executed by the Courts commissioner and the land conveyed. Petitioners erroneously state that the declaratory judgment action was filed June 24. In fact, the Respondent's declaratory judgment action was filed in federal court before the parties in the mandamus action even attempted to add Aerojet as a party there. (SA 13-19); RSA 9-45).

[8]21 *Fla.Jur.*, Mandamus, §33, p. 339.

ministerial duty exists which obliges the Trustees to offer the County certain lands involved (and now conveyed to Respondent), before offering them to private parties. By-passing for a moment all the reasons why such a statute could not apply to an option contract entered many years before enactment of the statutory requirement in question, it is abundantly clear that *any* right of the County *under the statute* arises only when there will be a conveyance. For the County to allege that the option is unlawful is to allege that there will be no sale to Respondent, and necessarily that the County has no claim under the statute to have first refusal on the property. The County must allege an imminent conveyance to allege a statutory duty by the Trustees. Without a conveyance, the County has no right under the statute and thus no mandamus claim. The County's petition is contradictory on its face because of the "power to option" allegation. Clearer evidence could not be found of the intent of the County and Trustees in procuring an alternative writ of mandamus. Having failed to convince the District Court and Court of Appeals on the "power" theory, and apparently recognizing their failure to make a case before this Court for abstention, a last resort action is taken to bootstrap this case before the Florida Supreme Court.

Petitioners and the County have outsmarted themselves. To have an action pending in the Florida Supreme Court in time to make the argument which appears in the Petitioners' "Supplemental Brief" now before this Court, it was necessary to resort to mandamus, an action which may be commenced against state officers only in the Florida Supreme Court. Rule 4.5(b), *Fla.App.R.* To do so, however, it was necessary to limit the petition to a claim for performance of an alleged statutory, ministerial duty.

This meant: (1) Aerojet could not be made a party and (2) the issue of the Trustees' power to option certainly would not be presented. What we now have is a perfectly obvious attempt by Petitioners to have their cake and eat it too: a mandamus action in the Florida Supreme Court with an absurd contention that the "power" issue is there presented for decision.

Aerojet went to Court with its specific performance claim almost three years ago. *Aerojet General Corporation v. Askew et al*, 318 FSupp. 55 (D.C., N.D., Fla. 1970). This issue of power has been briefed and considered by both the District Court and the Court of Appeals,[9] as is set out in our reply brief to the certiorari petition. Both courts have rejected the contention, and their decision is amply supported by numerous Florida cases interpreting Petitioners' powers. This issue does not present a basis for certiorari review, as appears from our reply brief. That being the case, certiorari should be denied, and this case should finally be terminated.

To the extent that *any* of the arguments appearing in the Petitioners' "Supplemental Brief" could properly come before this Court, they should do so only if a Florida case deciding the issues is in fact presented to this Court for review. At this point, Petitioners are asking this Court to stand by while they engage in a diversionary lawsuit, involving issues which could not influence the granting or denial of certiorari here. Certainly there is no authority to ask this Court to grant certiorari so this case stays alive while Petitioners (and their friends) try to litigate themselves into what they think is a more favorable position on certain arguments.

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[9] *Aerojet General Corporation v Askew et al*, 453 F2d 819 (5 Cir. Fla. 1971).

Even if Petitioners were to secure a Florida Supreme Court ruling that they did not have power to option land — a contingency so remote as to be incredible — there would exist other Florida law bases for the decision of the Court of Appeals which would not be affected.[10] So long as *any* arguable basis for the decision can be cited, this Court has consistently ruled that it will not undertake certiorari review. *Spiegel v. Commissioner*, 335 U.S. 701 (1949); *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Sims v. United States*, 359 U.S. 108 (1959); *Propper v. Clark*, 337 U.S. 472 (1949); *Richards v. United States*, 369 U.S. 1 (1962).

The District Court and the Court of Appeals have indulged Petitioners in their ceaseless requests for special treatment. On the ground that they are elected officers, and thus may be permitted to shift positions at will, Petitioners have asked for and been accorded every conceivable opportunity to present new and even contradictory positions.[11] There is *nothing* new happening *in this case*. Petitioners are simply contriving to find new fori for old arguments, and asking this Court to stand by to see what they can do. Surely there must come a point when Petitioners' special privileges should not be permitted to further delay the relief which Aerojet is due.

We respectfully submit that this case does not present a basis for granting certiorari, and that nothing the Petitioners are talking about doing would make the case a proper one for certiorari review. Under these circumstances, it is clear that certiorari should be denied.

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[10] See pp. 31, 32, Reply of Respondents to Petition for Certiorari.

[11] As noted in the Reply of Respondents to Petition for Certiorari (pp. 32, 34), Petitioners were granted leave to file supplemental briefs, after briefing was closed and the cause set for oral argument. In supplemental briefs, Petitioner repudiated previous concessions, and raised new issues for appellate decision.

CONCLUSION

For the reasons and upon the authorities presented herein and in the Respondent's Reply to the Petition for Writ of Certiorari, said Petition should be denied.

Respectfully submitted

George W. Wright Jr.

Karl B. Block Jr.

Attorneys for Respondent

Mershon, Sawyer, Johnston,
Dunwody and Cole
1600 First National Bank Building
Miami, Florida 33131
Of Counsel for Respondent

RESPONDENT'S SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 42,461

STATE OF FLORIDA, ex rel.
METROPOLITAN DADE COUNTY,
a political subdivision of the State of Florida,
Petitioner,

vs.

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, RICHARD B. STONE, Secretary of State of the State of Florida, ROBERT SHEVIN, Attorney General of the State of Florida, FRED O. DICKINSON, JR., Comptroller of the State of Florida, THOMAS D. O'MALLEY, Treasurer of the State of Florida; FLOYD T. CHRISTIAN, Commissioner of Education of the State of Florida, and DOYLE CONNOR, Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund, created under Chapter 253, F.S.,

Respondents.

(Filed June 9, 1972)

PETITION FOR THE ISSUANCE OF THE WRIT OF MANDAMUS

TO THE SUPREME COURT OF FLORIDA:

The Petition of the State of Florida, upon the relation or complaint of Metropolitan Dade County, a political subdivision of the State of Florida, respectfully shows:

1. Relator is Metropolitan Dade County, a political subdivision of the State of Florida.

2. Respondents are REUBIN O'DONOVAN ASKEW as the Governor of the State of Florida, RICHARD B. STONE as Secretary of State of the State of Florida, ROBERT SHEVIN as Attorney General of the State of Florida, FRED O. DICKINSON, JR. a Comptroller of the State of Florida, THOMAS D. O'MALLEY as Treasurer of the State of Florida, FLOYD T. CHRISTIAN as Commissioner of Education of the State of Florida, and DOYLE CONNOR as Commissioner of Agriculture of the State of Florida, as and constituting the Board of Trustees of the Internal Improvement Trust Fund, created by Section 253.02, F.S.

3. Jurisdiction of this Court is invoked under the provisions of Article V, Section 4, Subsection 2 of the Constitution of the State of Florida, in that the Respondents are State officers and comprise the Board of Trustees of the Internal Improvement Trust Fund, a board within the purview and meaning of this constitutional provision.

4. Respondents as such Trustees are charged with the administration of the trust fund specifically described in Section 253.01, Florida Statutes. Under the provisions of Section 253.02, Respondent Trustees are granted the "power to sell and transfer said lands" referred to in Section 253.01 "to the purchasers and receive payment for the same."

5. In December, 1961 the prior Trustees of the Internal Improvement Trust Fund, not those presently constituting the Board, granted an option to Aerojet-General

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Corporation to purchase the following described property, situated in Dade County, Florida, which constitutes part of the property designated and described in Section 253.01 F.S.:

> Sections 1 through 14, Township 57 South, Range 37 East; Sections 17 through 20, Township 56 South, Range 37 East; Sections 24 through 36, Township 56 South, Range 37 East; W½ of Section 5, Township 59 South, Range 38 East; Section 6, Township 59 South, Range 38 East.

This option was for a term of ten years and for a purchase price of $50. per acre. No legislative authority or power was then or ever has been vested in the Trustees to validly grant such an option.

6. Notwithstanding the existence of the alleged option, the Legislature of the State of Florida, in the exercise of its police power, enacted in 1965 Section 253.111, Florida Statutes, which provides in part as follows:

> "The Board of Trustees of the Internal Improvement Trust Fund of the State shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the County in which the land is situated to receive such land for public purposes . . . ."

At the time of the enactment of this statute and at the present time, the Board of Trustees of the Internal Improvement Trust Fund hold title to the above described property. The alleged option, above referred to, cannot operate to oust the Legislature of its power to require the Trustees to afford to Dade County an opportunity to acquire these lands for public purposes. This statute (a)

denies the power of the Respondent State Board of Trustees to execute the alleged option, (b) even though the alleged option has been executed prohibits the Respondent Trustees from conveying title to such lands upon purported exercise of this option without first affording an opportunity to Petitioner to acquire these lands for public purposes, and (c) is the exercise of the police power to protect public lands from being conveyed to private interests when they are needed and desired by the County for public purposes.

7. Respondent Trustees have not afforded to Dade County an opportunity to acquire these lands for public purposes and Respondents will in the near future convey these lands to Aerojet-General Corporation pursuant to the terms of this option and under the order and judgment of the U.S. District Court for the Northern District of Florida and affirmed by the U. S. Court of Appeals for the Fifth Circuit.

8. Petitioner was not a party to the action in the U. S. District Court and the judgment rendered by the U. S. District Court is not binding upon the Petitioner and does not constitute a judgment forfeiting the Petitioner's right to acquire the above described lands for public purposes.

9. The right of Petitioner to acquire these lands for public purposes under the provisions of Chapter 253, Florida Statutes, is prior to and supersedes any right or interest of Aerojet-General Corporation to acquire these lands.

10. The interpretation and construction of this Florida Statute is purely a State matter governed by State law, the final arbiter of the meaning of this statute, the

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powers of Respondent Trustees, and the effect of Section 253.111 being vested in the Supreme Court of Florida.

11. The Relator, Metropolitan Dade County, has no other plain, complete, speedy, and adequate remedy.

12. The issues here involved are not issues of fact requiring the taking of testimony.

13. The Relator, Metropolitan Dade County, and the people of Dade County will sustain injury and damage if they are denied the use and ownership opportunity of this land.

WHEREFORE, the Petitioner Dade County prays that the Supreme Court of Florida issue its Alternative Writ of Mandamus directed to Reubin O'Donovan Askew as Governor of the State of Florida, Richard B. Stone as Secretary of State of the State of Florida, Robert Shevin as Attorney General of the State of Florida, Fred O. Dickinson, Jr., as Comptroller of the State of Florida, Thomas D. O'Malley as Treasurer of the State of Florida, Floyd T. Christian as Commissioner of Education of the State of Florida, and Doyle Connor as Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund created under Chapter 253, Florida Statutes, requiring them to afford to the Petitioner Dade County the right to acquire these lands or show cause why they have failed to comply with the orders of this Alternative Writ of Mandamus.

/s/ Stuart Simon

STUART SIMON
Dade County Attorney
1626 Dade County Courthouse
Miami, Florida 33130
and

/s/ Alan T. Dimond

Alan T. Dimond
Assistant County Attorney

State of Florida)
) SS
County of Dade)

STUART SIMON and ALAN T. DIMOND, being duly sworn, depose and say that they are the persons who executed the foregoing instrument; that they have read the same and know the contents thereof; that the matters stated therein are true to their knowledge.

/s/ Stuart Simon

STUART SIMON
Dade County Attorney

/s/ Alan T. Dimond

ALAN T. DIMOND
Assistant County Attorney

Subscribed and sworn to before
me this 8th day of June, 1972.

/s/ Charlotte A. Booz

Notary Public,
State of Florida, at Large

Notary Public State of Florida at Large
My Commission expires May 12, 1975
General Insurance Underwriters, Inc.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DATE: JUNE 22, 1972

TO: Mr. Barry Scott Richard
Deputy Attorney General
Dept. of Legal Affairs
The Capitol
Tallahassee, Fla.

Mr. Philip S. Bennett
Gen. Counsel, St. of Fla.
Bd. of Trustees of the ITTF
Elliot Bldg.
Tallahassee, Fla.

Mr. George Wright
1600 First National Bank Bldg.
Miami, Fla. 33131

Mr. Stephen Marc Slepin, Counsel
St. of Fla., Bd. of Education
347 S. Duval St.,
Tallahassee, Fla.

RE: TCA 1534 (Case No.)
Aerojet-General Corp. etcl vs.
Reubin O'Donovan Askew etc.

. . . . . .

You are advised that on the 20th day of June 1972, the following action was taken in the above-entitled case by the Court.

DATE MOTION FILED: June 16, 1972

PLAINTIFF'S MOTION ( )

DEFENDANT'S MOTION (X)

TYPE OF MOTION: Motion for Reconsideration and Stay and Memorandum of Law

ACTION TAKEN: GRANTED ( ) DENIED (X)

REMARKS:

MARVIN S. WAITS, Clerk

BY: /s/ T. F. John

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA,
TALLAHASSEE DIVISION

No. TCA 1831
(Filed June 20, 1972)

AEROJET-GENERAL CORP.,
an Ohio corporation,

Plaintiff,

vs.

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, RICHARD B. STONE, Secretary of the State of Florida, ROBERT SHEVIN, Attorney General of the State of Florida, FRED O. DICKINSON, JR., Comptroller of the State of Florida, THOMAS D. O'MALLEY, Treasurer of the State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education of the State of Florida, and DOYLE CONNER, Commissioner of Agriculture of the State of Florida, as and constituting members of the Board of Trustees of the Internal Improvement Fund of the State of Florida; STEPHEN P. CLARK, Mayor of Metropolitan Dade County, and S. A. DANSYEAR, JOYCE GOLDBERG, HARVEY I. REISMAN, EDWARD T. GRAHAM, EDWARD C. FOGG, III, JAMES F. MCKILLIPS and HARRY P. CAIN, Commissioners of Metropolitan Dade County, as and constituting the Board of County Commissioners of Metropolitan Dade County, Florida; METROPOLITAN DADE COUNTY, FLORIDA; and STUART SIMON, County Attorney of Metropolitan Dade County, as County Attorney of Metropolitan Dade County, Florida,

Defendants.

COMPLAINT FOR DECLARATORY DECREE AND INJUNCTIVE RELIEF

Plaintiff sues Defendants and says:

1. The Plaintiff is a corporation duly incorporated, organized and existing under the laws of Ohio, with its principal place of business in a state other than the State of Florida.

2. REUBIN O'DONOVAN ASKEW is Governor of the State of Florida. RICHARD B. STONE is Secretary of the State of Florida. ROBERT SHEVIN is Attorney General of the State of Florida. FRED O. DICKINSON, JR. is Comptroller of the State of Florida. THOMAS D. O'MALLEY is Treasurer of the State of Florida. FLOYD T. CHRISTIAN is Commissioner of Education of the State of Florida. DOYLE CONNER is Commissioner of Agriculture of the State of Florida. In their respective official capacities, said Defendants are members of and constitute the Board of Trustees of the Internal Improvement Fund of the State of Florida. (Hereafter, "Trustees") Said Defendants are citizens of the State of Florida.

3. STEPHEN P. CLARK is Mayor of Metropolitan Dade County, Florida. S. A. DANSYEAR, JOYCE GOLDBERG, HARVEY I. REISMAN, EDWARD T. STEPHENSON, EDWARD T. GRAHAM, EDWARD C. FOGG, III, JAMES F. MCKILLIPS and HARRY P. CAIN are Commissioners of Metropolitan Dade County, Florida. The Defendants named in this paragraph are and constitute the Board of County Commissioners of Metropolitan Dade County, Florida (Hereafter, "Commissioners") Said Defendants are citizens of the State of Florida.

4. METROPOLITAN DADE COUNTY, (Hereafter, Dade County" or "County"), is a political subdivision of the State of Florida, having, under the provisions of the Florida Constitution, the powers of local self government.

5. STUART SIMON is County Attorney of Metropolitan Dade County, Florida. Said Defendant is a citizen of the State of Florida. (Hereafter, "County Attorney")

6. The matter in controversy herein exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. This action arises under the Constitution of the United States, to enforce Plaintiff's Constitutional rights, as hereinafter more fully appears. This Court has jurisdiction of the cause pursuant to Title 28 U.S.C. §§1131, 1132.

7. On or about the 21st day of December, 1961, Plaintiff and the Trustees entered into a written Lease With Option to Purchase, a true and correct copy of which is attached hereto and by reference made a part hereof as Exhibit A. A memorandum of said Lease With Option to Purchase was recorded in the Public Records of Dade County, Florida, on December 17, 1962, in Official Records Book 3450, at page 470. Said Lease-Option was also entered into by the STATE OF FLORIDA, BOARD OF EDUCATION (hereafter "Board of Education"), the membership of which Board is identical to the membership of the Defendant Board of Trustees.

8. Pursuant to the Lease-Option contract, Plaintiff did exercise its option to purchase the lands described in the contract, by serving upon the Trustees and the Board of Education written notice of the exercise of said option

to purchase on September 8, 1969. Thereafter, the Trustees and Board of Education refused to perform their contract by decling to convey the property described in the Lease-Option to Plaintiff in return for payment of the specified purchase price. Thereupon, Plaintiff herein filed suit in this Court for specific performance of the contract, (Case TCA-1534) and in September 21, 1970, this Court entered Final Judgment of Specif Performance for Plaintiff (318 F. Supp. 55),which judgment was affirmed by the United States Court of Appeals, Fifth Circuit, (hereafter "Court of Appeals") on December 9, 1971 (453 F2d 819) and its mandate issued on March 9, 1972. That case presently pends before the United States Supreme Court on petition for writ of certiorari, as case number 71-1505, although applications by the Trustees and Board of Education for a stay of enforcement of this Court's Final Judgment by specific performance and the mandate of the Court of Appeals were made both to the Court of Appeals and the United States Supreme Court and denied.

9. Subsequent to affirmance by the Court of Appeals of this Court's judgment of specific performance aforementioned, while the cause remained pending on petition for writ of certiorari before the Supreme Court of the United States, and even as this Court was entering its orders to enforce its specific performance judgment of September 21, 1970, Defendant DADE COUNTY filed a petition for writ of mandamus (hereafter "the mandamus proceedings") in the Florida Supreme Court, seeking mandamus relief against the Defendant-TRUSTEES. Said Petition was filed by Defendant SIMON, purportedly pursuant to his authority to act as attorney for Defendant DADE COUNTY and Defendant COMMISSIONERS. True copy of said petition and memorandum in support

thereof are attached hereto as Exhibit B. Plaintiff is not a party to said mandamus proceeding. The Defendants who are parties to said mandamus proceedings are now engaged in what amounts to a friendly suit that attempts and would purport to invoke the application of a Florida Statute §253.111 to Plaintiff's contract (Exhibit A), that if so applied would unconstitutionally impair contractual rights held by Plaintiff and also attempts and purports to put in issue the question of impairment of Plaintiff's contractual rights by the issuance of a peremptory writ of mandamus, compelling the TRUSTEES to offer most of the aforesaid lands covered by Plaintiff's contract for sale to Dade County. Said Florida Statute was enacted long subsequent to the execution of the Lease-Option contract attached hereto as Exhibit A, and, therefore, has no application thereto, but, if so applied, as sought by Defendants in the mandamus proceedings, would impair the obligation of contract in the manner prohibited by Article 1, Section 10 of the United States Constitution.

10. The Supreme Court of Florida, upon the COUNTY's petition and TRUSTEES' consent thereto, (true copy of which is attached hereto as Exhibit C), has issued its alternative writ of mandamus (true copy of which is attached hereto as Exhibit D) compelling the Defendant TRUSTEES to offer for sale to the COUNTY most of the property lease-optioned to Plaintiff by the contract attached as Exhibit A, or to show cause by written return and brief on or before July 5, 1972, why a peremptory writ of mandamus so compelling the TRUSTEES should not issue. Said issuance of an alternative writ of mandamus is a ruling by the Supreme Court of Florida that prima facie, §253.111, Fla. Stats. applies to the contract attached hereto as Exhibit A. (Rule 4.5b(3), Florida Appellate Rules).

11. Defendants, jointly or severally, seek under color of law, to enforce a state statute which Plaintiff seeks to prevent on the ground that the statute is unconstitutional if applied as aforesaid, and if so applied and enforced against Plaintiff, would work irreparable injury for which injunctive relief as hereafter prayed for is necessary in aid of this Court's jurisdiction herein and to protect and effectuate its prior judgments and orders.

12. As to this Plaintiff, all issues of the applicability to its contract of §253.111, Fla. Stats., are res judicata as between Plaintiff and Defendant TRUSTEES, and the judgment of specific performance heretofore entered by this Court precludes the COUNTY from securing from the TRUSTEES title to the lands described in Exhibit A.

13. There is a genuine and bona fide dispute between Plaintiff and Defendants as to the issues of law herein above raised and alleged.

14. Plaintiff is without adequate remedy at law.

WHEREFORE, Plaintiff prays the Court will take jurisdiction of the cause and the parties, and:

a. Declare and adjudge that Florida Statute §253.111 does not apply to the contract attached hereto as Exhibit A, or is unconstitutional as violative of Art. 1, §10 U.S. Constitution, to the extent it may be applicable to such contract so as to deny to Plaintiff its contractual rights to acquire or retain title to the lands described in said contract.

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b. Preliminarily enjoin Defendants, jointly and severally, from proceeding in any way with the mandamus proceedings referred to above which is presently pending in the Supreme Court of Florida, and from the enforcement of any writ, judgment or order entered therein.

c. Preliminarily enjoining Defendants, jointly and severally, from instituting or prosecuting any other suit or action the object or purpose of which is to deny to Plaintiff the right to receive or retain title to the lands described in the contract attached as Exhibit A.

d. That, upon final hearing, the preliminary injunctives sought in paragraphs b and c above be made permanent.

e. Grant unto Plaintiff such other and further relief as the Court deems proper.

f. Grant unto Plaintiff its costs herein.

MERSHON, SAWYER,
JOHNSTON, DUNWODY
& COLE
Attorneys for Plaintiff
Aerojet-General Corporation
1600 First National Bank Building
Miami, Florida 33131

By_____
George W. Wright, Jr.

By_____
Karl B. Block, Jr.

EXHIBIT A

LEASE WITH OPTION TO PURCHASE

THIS AGREEMENT made and executed this 21st day of December, 1961, by and between the State of Florida, by and through the Trustees of the Internal Improvement Fund of the State of Florida, and the State Board of Education of Florida, component state agencies of the State of Florida, with offices located in Tallahassee, Leon County, Florida, and Aerojet-General Corporation, a corporation organized and existing under the laws of the State of Ohio, with principal place of business in Azusa, Los Angeles County, California.

WITNESSETH:

WHEREAS, the Trustees of the Internal Improvement Fund of the State of Florida and the State Board of Education of Florida are vested with title to certain State lands located in Dade County, Florida, and are charged with the administration, management, control, supervision, conservation and protection of these lands, and

WHEREAS, said aforementioned Government agencies have been advised by Aerojet-General Corporation that it has a need for a large tract of land, a part of which consists of these State lands, for the purpose of establishing a manufacturing plant and associated facilities to be used in production activities which are designed to strengthen the defense posture of the United States, and

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WHEREAS, the best interests of the people of the State of Florida will be served by said State lands being devoted to such usage, the aforementioned government agencies have heretofore, in compliance with statutory requirements of the State of Florida, taken such action as is necessary to permit such a use of said State lands as aforesaid, and

WHEREAS, all statutory requirements have been satisfied and other necessary action taken, the Trustees of the Internal Improvement Fund of the State of Florida and the State Board of Education of Florida, component state agencies of the State of Florida, are authorized and empowered to enter into this Agreement and to authorize its execution.

NOW, THEREFORE, IT IS MUTUALLY UNDERSTOOD AND AGREED that for and in consideration of the sum of TEN DOLLARS ($10.00) paid by each party hereto to the other, receipt of which the parties each and severally acknowledge and in further consideration of the mutual covenants of the respective parties hereto, it is hereby agreed by and between the Trustees of the Internal Improvement Fund of the State of Florida, and the State Board of Education of Florida, component state agencies of the State of Florida, hereinafter referred to as "Lessor" and Aerojet-General Corporation, hereinafter referred to as "Lessee", as follows:

1. That the Lessor hereby leases to the Lessee the following described land, situate in Dade County, Florida, the ownership of said land being indicated opposite the description:

STATE OWNED LANDS IN THE HOMESTEAD AREA

Sections	Acres*	Ownership
1 thru 14 - T56S-R37E	8960	Trustees, I.I.F.
15 & 16 - T56S-R37E	1280	Board of Education
17 thru 20 - T56S-R37E	2560	Trustees, I.I.F.
21 thru 23 - T56S-R37E	1920	Board of Education
24 thru 36 - T56S-R37E	8320	Trustees, I.I.F.
16 - T57S-R37E	640	Board of Education
W ½ of 5 - T59S-R38E	328	Trustees, I.I.F.
6 - T59S-R38E	665	Trustees, I.I.F.
16 - T59S-R38E	640	Board of Education
TOTAL ACREAGE	25313	

*Acreages listed are based upon a presumption of 640 acres per section, but in the event the Lessee desires a more accurate total acreage it is hereby granted the right and privilege of having the land surveyed by a certified public land surveyor, at its own expense, to be approved by the Lessor and the total acreage shown as a result of such survey shall be considered the correct total acreage in lieu of the total acreage shown herein.

TO HAVE AND TO HOLD the same unto the said Lessee, its successors and assigns for a period of ten (10) years from date hereof upon the following terms and conditions:

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2. The Lessee agrees to pay an annual rental for said land of an amount equal to the sum of TWO DOLLARS AND FIFTY CENTS ($2.50) per acre for the period of the lease unless this lease is sooner terminated or cancelled as herein provided for. The annual rental herein agreed to be paid shall be due and payable in advance, the first such payment to be on execution of this Agreement with subsequent payments to be made on each anniversary date thereafter.

3. The Lessee herewith agrees and covenants to commence within twelve (12) months after the execution hereof, the construction and installation of a manufacturing plant and associated facilities on said land or upon lands contiguous thereto owned, leased or controlled by Lessee and in so doing to utilize the aforementioned described land in conjunction with the operation of such manufacturing plant and associated facilities.

4. The Lessor shall have the right to cancel this lease upon breach or failure of Lessee to comply with any of the covenants herein agreed to be kept or performed by Lessee. However, in the event of such breach or failure on the part of Lessee, Lessor shall give Lessee sixty (60) days notice, in writing, of its intention to cancel this lease and thereupon, unless such breach or failure be cured by Lessee within said sixty (60) day period, this lease and the terms hereof shall expire and come to an end on the date fixed in such notice as if the said date were the date originally fixed in this lease for the expiration thereof.

It is mutually understood and agreed that this lease shall terminate if option to purchase said lands hereinafter granted by Lessor to Lessee is exercised by Lessee and that

in such event no covenant herein made on the part of Lessee shall extend beyond such termination of this lease excepting the covenant of Lessee contained in paragraph 5 next below.

5. The Lessee agrees and herewith covenants that the land herein leased and for which an option to purchase is herein granted shall not be used by Lessee for purposes of land speculation in any manner whatsoever for a period of ten (10) years next following the execution of this Agreement without written approval of Lessor first had and obtained.

6. It is mutually agreed that all improvements of every kind and nature placed upon the lands during the term of lease shall, in all legal intendment, as between parties, be deemed and considered personal property of Lessee. Upon expiration or cancellation of the Lease, either Lessee shall have removed all such improvements providing Lessee at the time of such removal or removals has complied with all the terms and conditions of this Lease, or in the alternative, Lessee may elect to abandon such improvements, in which event title thereto shall pass to Lessor.

7. The Lessee further agrees and obligates itself to pay annually to the appropriate local public agencies a sum of money equal to, but considered as in lieu of, any and all ad valorem taxes which would be due and payable on all the lands described herein if title thereto were owned in fee by the Lessee; also, to pay any valid special assessment levied on said land. Said annual payments shall be paid by Lessee during the lease period or until purchase of said lands by Lessee is effectuated as provided for herein. The procedure for compliance with the provisions of this paragraph shall be the responsibility of the Lessee in cooperation with the local government agencies affected.

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8. The Lessor herewith grants to the Lessee the exclusive right, option and privilege to purchase all of the land described herein at any time within the ten (10) year lease period at and for a price of Fifty Dollars ($50.00) per acre. In the event the Lessee exercises its right, option and privilege to purchase the above described land, the purchase price of said land to be determined by the number of acres multiplied by Fifty Dollars ($50.00), less the amount of any unearned rent paid by Lessee under the terms of this lease shall be payable as follows:

(a) Upon the election of Lessee, the total amount of the purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee subject only to applicable statutory rights and reservations in effect on date of conveyance and the covenant on the part of Lessee to be kept and performed contained in paragraph 5 above, or

(b) Upon election of Lessee, the payment of any amount equal to or in excess of twenty per cent (20%) of the total purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with the execution of a contract to purchase by and between the parties hereto, which contract to purchase shall provide for a promissory note for an amount equal to the unpaid balance due to Lessor from Lessee for purchase price of said lands described herein, which note shall be paid to Lessor by Lessee in ten (10) equal and consecutive annual installments together with interest on the unpaid balance thereof at the rate of five per cent (5%) per annum. Lessee shall

have the express right and privilege to pay up to and including the entire unpaid balance of any promissory note representative of the unpaid balance of the purchase price at any time after the execution thereof, without penalty. Upon payment to Lessor by Lessee of the promissory note representing the balance due on contract to purchase, the Lessor agrees to deliver to said Lessee a fee simple deed to said lands vesting good and merchantable fee simple title in Lessee, subject only to the applicable statutory rights and reservations in effect on date of the contract to purchase and the covenant of Lessee contained in paragraph 5 above.

9. This Lease shall not be subject to assignment on the part of Lessee without written approval of Lessor first had and obtained.

10. The Lessee shall save Lessor harmless from any liability to any third person or property which might result from operations conducted by Lessee under the terms of this Lease prior to exercise of option herein granted to purchase the land herein described.

11. Lessee agrees and obligates itself to grant to the Central and Southern Florida Flood Control District, or its successor, such easements and rights of entry upon the lands herein described as will be needed or required to make or cause to be made and constructed thereon such canals, cuts, sluiceways, dikes and other works as might, in the judgment of the said Flood Control District, or its successor, be necessary and needful for drainage and reclamation of the land; also to grant to the said Flood Control District, or its successor, the right to take from the said land and to use such gravel, stone or earth as

might, in the judgment of the said Flood Control District, or its successor, be necessary to use in the construction of said canals, cuts, sluiceways, dikes and other works upon said land for the purposes hereinbefore set forth.

IN WITNESS WHEREOF the Trustees of the Internal Improvement Fund and the State Board of Education, hereinabove referred to as Lessor, have hereunto set their hands and affixed their respective seals and the seal of the Commissioner of Agriculture of the State of Florida and the Aerojet-General Corporation, hereinabove referred to as Lessee, has caused its name to be signed by its duly authorized officers and attested by its Secretary and affixed its corporate seal, in triplicate, the day and year first above written.

/s/ Faris Bryant (SEAL)

Governor

/s/ J. Edwin Larson (SEAL)

State Treasurer

/s/ Ray E. Green (SEAL)

Comptroller

/s/ Richard W. Ervin (SEAL)

Attorney General

(SEAL, TRUSTEES, INTERNAL IMPROVEMENT FUND)

/s/ Doyle Conner (SEAL)

Commissioner of Agriculture

(SEAL,
COMMISSIONER
OF AGRICULTURE)

As and Constituting the Trustees of the Internal Improvement Fund of the State of Florida.

/s/ Faris Bryant (SEAL)

Governor

/s/ John Adams (SEAL)

Secretary of State

/s/ Richard W. Ervin (SEAL)

Attorney General

/s/ J. Edwin Larson (SEAL)

State Treasurer

/s/ Albert [illegible] (SEAL)

Superintendent of Public Instruction

As and Constituting the Board of Education of the State of Florida.

Lessor.

AEROJET-GENERAL CORPORATION, an Ohio corporation

By /s/ A. H. Rude (SEAL)

Chairman of the Board

ATTEST:
/s/ T. E. Beehan

Secretary

Lessee.

STATE OF CALIFORNIA)
:ss
COUNTY OF LOS ANGELES)

I HEREBY CERTIFY that before me personally appeared A. H. RUDE, Chairman of the Board and T. E. BEEHAN, Secretary of Aerojet-General Corporation, a corporation organized and existing under and by virtue of the laws of the State of Ohio, to me known to be the persons described in and who executed the foregoing instrument and severally acknowledged the execution thereof to be their free act and deed as such officers pursuant to lawful authority theretofore given by said Corporation for the uses and purposes therein mentioned; and that they affixed thereto the official seal of said corporation, and the said instrument is the act and deed of said corporation.

WITNESS my hand and official seal in the County of Los Angeles, State of California, this 21st day of December, A.D. 1961.

/s/ W. Jean Brewer

Notary Public

W. JEAN BREWER - Notary Public
In and for the County of Los Angeles
and State of California
My Commission Expires March 19, 1965

EXHIBIT B

IN THE SUPREME COURT OF FLORIDA

CASE NO. 42,461

STATE OF FLORIDA, ex rel. METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs.

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, RICHARD B. STONE, Secretary of State of the State of Florida, ROBERT SHEVIN, Attorney General of the State of Florida, FRED O. DICKINSON, JR., Comptroller of the State of Florida, THOMAS D. O'MALLEY, Treasurer of the State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education of the State of Florida, and DOYLE CONNER, Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund, created under Chapter 253, F.S.,

Respondents.

PETITION FOR THE ISSUANCE OF THE WRIT OF MANDAMUS

TO THE SUPREME COURT OF FLORIDA:

The Petition of the State of Florida, upon the relation or complaint of Metropolitan Dade County, a political subdivision of the State of Florida, respectfully shows:

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1. Relator is Metropolitan Dade County, a political subdivision of the State of Florida.

2. Respondents are REUBIN O'DONOVAN ASKEW as the Governor of the State of Florida, RICHARD B. STONE as Secretary of State of the State of Florida, ROBERT SHEVIN as Attorney General of the State of Florida, FRED O. DICKINSON, JR. as Comptroller of the State of Florida, THOMAS D. O'MALLEY as Treasurer of the State of Florida, FLOYD T. CHRISTIAN as Commissioner of Education of the State of Florida, and DOYLE CONNOR as Commissioner of Agriculture of the State of Florida, as and constituting the Board of Trustees of the Internal Improvement Trust Fund, created by Section 253.02, F.S.

3. Jurisdiction of this Court is invoked under the provisions of Article V, Section 4, Subsection 2 of the Constitution of the State of Florida, in that the Respondents are State officers and comprise the Board of Trustees of the Internal Improvement Trust Fund, a board within the purview and meaning of this constitutional provision.

4. Respondents as such Trustees are charged with the administration of the trust fund specifically described in Section 253.01, Florida Statutes. Under the provisions of Section 253.02, Respondent Trustees are granted the "power to sell and transfer said lands" referred to in Section 253.01 "to the purchasers and receive payment for the same."

5. In December, 1961 the prior Trustees of the Internal Improvement Trust Fund, not those presently constituting the Board, granted an option to Aerojet-General

Corporation to purchase the following described property, situated in Dade County, Florida, which constitutes part of the property designated and described in Section 253.01, F.S.:

> Sections 1 through 14, Township 57 South, Range 37 East; Sections 17 through 20, Township 56 South, Range 37 East; Sections 24 through 36, Township 56 South, Range 37 East; W ½ of Section 5, Township 59 South, Range 38 East; Section 6, Township 59 South, Range 38 East.

This option was for a term of ten years and for a purchase price of $50. per acre. No legislative authority or power was then or ever has been vested in the Trustees to validly grant such an option.

6. Notwithstanding the existence of the alleged option, the Legislature of the State of Florida, in the exercise of its police power, enacted in 1965 Section 253.111, Florida Statutes, which provides in part as follows:

> "The Board of Trustees of the Internal Improvement Trust Fund of the State shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the County in which the land is situated to receive such land for public purposes . . . ."

At the time of the enactment of this statute and at the present time, the Board of Trustees of the Internal Improvement Trust Fund hold title to the above described property. The alleged option, above referred to, cannot operate to oust the Legislature of its power to require the Trustees to afford to Dade County an opportunity to acquire these lands for public purposes. This statute (a) denies the power of the Respondent State Board of Trus-

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tees to execute the alleged option, (b) even though the alleged option has been executed prohibits the Respondent Trustees from conveying title to such lands upon purported exercise of this option without first affording an opportunity to Petitioner to acquire these lands for public purposes, and (c) is the exercise of the police power to protect public lands from being conveyed to private interests when they are needed and desired by the County for public purposes.

7. Respondent Trustees have not afforded to Dade County an opportunity to acquire these lands for public purposes and Respondents will in the near future convey these lands to Aerojet-General Corporation pursuant to the terms of this option and under the order and judgment of the U. S. District Court for the Northern District of Florida and affirmed by the U. S. Court of Appeals for the Fifth Circuit.

8. Petitioner was not a party to the action in the U. S. District Court and the judgment rendered by the U. S. District Court is not binding upon the Petitioner and does not constitute a judgment forfeiting the Petitioner's right to acquire the above described lands for public purposes.

9. The right of Petitioner to acquire these lands for public purposes under the provisions of Chapter 253, Florida Statutes, is prior to and supersedes any right or interest of Aerojet-General Corporation to acquire these lands.

10. The interpretation and construction of this Florida Statute is purely a State matter governed by State law, the final arbiter of the meaning of this statute, the powers of Respondent Trustees, and the effect of Section 253.111 being vested in the Supreme Court of Florida.

11. The Relator, Metropolitan Dade County, has no other plain, complete, speedy, and adequate remedy.

12. The issues here involved are not issues of fact requiring the taking of testimony.

13. The Relator, Metropolitan Dade County, and the people of Dade County will sustain injury and damage if they are denied the use and ownership opportunity of this land.

WHEREFORE, the Petitioner Dade County prays that the Supreme Court of the State of Florida issue its Alternative Writ of Mandamus directed to Reubin O'Donovan Askew as Governor of the State of Florida, Richard B. Stone as Secretary of State of the State of Florida, Robert Shevin as Attorney General of the State of Florida, Fred O. Dickinson, Jr., as Comptroller of the State of Florida, Thomas D. O'Malley as Treasurer of the State of Florida, Floyd T. Christian as Commissioner of Education of the State of Florida, and Doyle Connor as Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund created under Chapter 253, Florida Statutes, requiring them to afford to the Petitioner Dade County the right to acquire these lands or show cause why they have failed to comply with the orders of this Alternative Writ of Mandamus.

/s/ Stuart Simon

STUART SIMON
Dade County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

and

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/s/ Alan T. Dimond

Alan T. Dimond
Assistant County Attorney

State of Florida)
)SS
County of Dade)

STUART SIMON and ALAN T. DIMOND, being duly sworn, depose and say that they are the persons who executed the foregoing instrument; that they have read the same and know the contents thereof; that the matters stated therein are true to their knowledge.

/s/ Stuart Simon

STUART SIMON
Dade County Attorney

/s/ Alan T. Dimond

ALAN T. DIMOND
Assistant County Attorney

Subscribed and sworn to before
me this 8th day of June, 1972.

/s/ Charlotte A. Booz

Notary Public,
State of Florida, at Large

My Commission Expires May 12, 1975
General Insurance Underwriters, Inc.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 42,461

STATE OF FLORIDA, ex rel. METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs.

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, RICHARD B. STONE, Secretary of State of the State of Florida, ROBERT SHEVIN, Attorney General of the State of Florida, FRED O. DICKINSON, JR., Comptroller of the State of Florida, THOMAS D. O'MALLEY, Treasurer of the State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education of the State of Florida, and DOYLE CONNOR, Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund, created under Chapter 253, F.S.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR THE ISSUANCE OF THE WRIT OF MANDAMUS

State of Florida ex rel. Metropolitan Dade County's Petition for the Issuance of the Writ of Mandamus is filed pursuant to Rule 2.1(a)(5) and 4.5(b) of the Florida Appellate Rules. This Honorable Court has jurisdiction to issue an alternative writ since a state officer(s), board, or other agency authorized to represent the public generally is named as respondent; specifically

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Respondents are REUBIN O'DONOVAN ASKEW as the Governor of the State of Florida, RICHARD B. STONE, as Secretary of State of the State of Florida, ROBERT SHEVIN as Attorney General of the State of Florida, FRED O. DICKINSON, JR. as Comptroller of the State of Florida, THOMAS D. O'MALLEY as Treasurer of the State of Florida, FLOYD T. CHRISTIAN as Commissioner of Education of the State of Florida, and DOYLE CONNOR as Commissioner of Agriculture of the State of Florida, as and constituting the Board of Trustees of the Internal Improvement Trust Fund, created by Section 253.02, F.S.

STATEMENT OF THE CASE AND ARGUMENT

In December, 1961, the Trustees of the Internal Improvement Trust Fund granted a ten-year option to purchase at fifty dollars ($50.00) an acre to Aerojet General Corporation to the following lands located in Dade County, Florida:

> Sections 1 through 14, Township 57 South, Range 37 East; Sections 17 through 20, Township 56 South, Range 37 East; Sections 24 through 36, Township 56 South, Range 37 East; W ½ of Section 5, Township 59 South, Range 38 East; Section 6, Township 59 South, Range 38 East.

The above lands consist of 20.833 acres. Aerojet did not attempt to exercise this option until 1969.

An option to purchase land does not vest the holder of the option with any interest, legal or equitable, in the land

itself. Therefore, the Trustees continued to hold the fee simple title to these lands and still hold the fee simple title to these lands and they have not been conveyed.

These lands were acquired pursuant to an act of Congress approved September 28, 1850. See Trustees of Internal Improvement Fund, et al. v. Root, 58 So. 371.

The patent issued pursuant to this act of Congress provided that the U.S. granted these lands to the State of Florida, in fee simple, "subject to the disposal of the legislature thereof." Everglades Co. v. Bryant, 87 So. 68.

After the granting of the option but prior to any effort to exercise it by Aerojet, the Legislature of the State of Florida, pursuant to its police power, directed that the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida "shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the County in which such land is situated to receive such land for public purposes." Section 253.111 F.S. Therefore, the Trustees have a clear legal duty—ministerial act—involving no judgment or discretion.

Aerojet has brought proceedings in the Federal Court and has procured a judgment requiring the Trustees to convey these lands to it upon the payment by Aerojet of $50.00 an acre. No conveyance as yet has been made. Title is vested still in the Trustees. The Trustees have appealed this decision and have filed a Petition for Writ of Certiorari to the Supreme Court of the United States. That petition is now pending and undisposed of.

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The clear intent of Section 253.111 F.S. is to preserve all public land for public use if the land is needed and desired by the County within which the land is located. The statute would appear to negate the power of the Trustees of the Internal Improvement Trust Fund to give a ten-year option to purchase public land and thus to frustrate and contract away the police power of the State of Florida over lands the title to which is vested in the Trustees. The title to these lands was vested in the Trustees in 1965. The unexercised option to purchase vested no interest or estate in Aerojet. Warren v. City of Leesburg, 203 So.2d 552. The statute would therefore appear to be applicable to the lands involved.

From an examination of the opinion of the Court of Appeals, Fifth Circuit, in the Aerojet case, cited at 453 F.2d 819, the rights of Metropolitan Dade County were not before the Court and have not been adjudicated by that opinion. Under the provisions of Section 253.111 F.S. the Trustees "shall not sell or convey" the lands involved "to which they hold title unless and until they shall afford an opportunity" to Metropolitan Dade County "to receive such lands for public purposes." An option contract is not a contract of sale within any definition of the term. South Investment Co. v. Norton, 57 So.2d 1, 2. The Trustees are required to "notify the Board of County Commissioners" of Metropolitan Dade County "that such land is available to such County, which notification shall be given by registered mail, return receipt requested." No such notification has been given to Metropolitan Dade County, even though the trustees are under an imperative legal duty to provide such notification.

It will undoubtedly be contended that the option contract rights obtained by Aerojet in 1961 permitting the purchase of substantial state lands at an unconscionably low price effective over a lengthy period of years cannot be impaired by the subsequent enactment of Section 253.111 Florida Statutes, without violating Aerojet's constitutional rights. Such a contention is without merit, in our view.

A valid exercise of the public's police power through the Legislature on a matter of overpowering public interest is valid, even though it may affect existing contractual obligations. City of El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577. See also 6 Fla. Jur., Constitutional Law, Sec. 177 and the cases cited thereunder. The section states:

> "The prohibition against laws impairing the obligation of contracts is not a limitation upon the exercise of the police power. Generally speaking, the inhibition of the Federal Constitution upon the impairment of the obligations of contracts by the states is not violated by the legitimate exercise of legislative power in securing the health, safety, morals, and general welfare. The question is not whether the legislative action affects contracts incidentally or directly or indirectly, but whether the legislation is directed to a legitimate end and the measures taken are reasonable and appropriate to that end."

If a contract may be impaired by legislation enacted after the execution of such contract, the legislation must attempt to secure the health, safety, morals or welfare of the people. It may not properly be contended in this case that the grant of the first opportunity to counties to

acquire state owned lands for public recreational purposes constitutes anything except an action in aid of the public health, safety and welfare. This is particularly true when the county involved is both the most populous and the most densely populated urban area in the state and the option holder is a commercial corporation that will obviously use the land upon acquisition for mercantile purposes. In our opinion Section 253.111, Florida Statutes, is directed to a legitimate and socially beneficial end, seeks to obtain this end of preserving the public's domain for the benefit of the public through rational and non-discriminatory means, and may therefore validly impair Aerojet's option. See Ferguson v Skrupa (1962) 372 U.S. 726, 10 L.ed 2d 93, 83 S.Ct. 1028, and 95ALR. 2d 1347.

Metropolitan Dade County requires affirmative judicial action to establish its right of first refusal, before the Trustees are required to convey this property to Aerojet. Therefore, Metropolitan Dade County files this petition, so that the public interest in preserving these lands, for public use, is preserved.

Metropolitan Dade County has instituted proceedings in the Supreme Court of Florida against the Trustees of the Internal Improvement Trust Fund seeking a Writ of Mandamus requiring the issuance of the notification to Dade County required by Section 253.111 F.S. and a Prohibition against the conveyance of this land. The Federal Court did not consider the effect of Section 253.111 F.S. as it applied to the power of the Trustees to perform the option without first giving Dade County its right of first refusal. The final authority is vested in the Supreme Court of Florida to make this determination because this is purely a State matter.

The relator has no other plain, speedy and adequate remedy. Metropolitan Dade County respectfully requests this Honorable Court to grant the requested relief.

STUART SIMON
Dade County Attorney

by /s Alan T. Dimond

ALAN T. DIMOND
Assistant Dade County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

EXHIBIT C

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

STATE OF FLORIDA ex rel METROPOLITAN DADE COUNTY, a political instrumentality of the State of Florida,

Petitioner

vs.

REUBIN O'D ASKEW, et al, comprising the Board of Trustees of the Internal Improvement Trust Fund,

Respondents

(Filed June 9, 1972)

WAIVER OF NOTICE OF HEARING AND CONSENT TO ISSUANCE OF ALTERNATIVE WRIT OF MANDAMUS

BLEED THROUGH POOR COPY

Comes now Respondents, by and through their undersigned counsel and waive notice of hearing and consent to issuance of an alternative writ of mandamus in this cause.

Robert L. Shevin
Attorney General

/s/ Barry S. Richard

Barry S. Richard
Deputy Attorney General
The Capitol
Tallahassee, Florida

/s/ M. Stephen Turner

M. Stephen Turner
General Counsel
Board of Trustees
Eliott Building
Tallahassee, Florida

I hereby certify that I have served a copy of the foregoing to Stuart L. Simon, County Attorney, Dade County Court House, Miami, Florida, this 9th day of June, 1972.

/s/ M. Stephen Turner

M. Stephen Turner

A TRUE COPY
Attest:
SID J. WHITE, Clerk
Supreme Court of Florida
by name illegible
Deputy Clerk

EXHIBIT D

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1972
MONDAY, JUNE 12, 1972

STATE OF FLORIDA, ex rel. METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs.

REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, RICHARD B. STONE, Secretary of State of the State of Florida, ROBERT SHEVIN, Attorney General of the State of Florida, FRED O. DICKINSON, JR., Comptroller of the State of Florida, THOMAS D. O'MALLEY, Treasurer of the State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education of the State of Florida, and DOYLE CONNOR, Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund, created under Chapter 253, F.S.,

Respondents.

ALTERNATIVE WRIT OF MANDAMUS

CASE NO. 42,461

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA TO REUBIN O'DONOVAN ASKEW, GOVERNOR OF THE STATE OF FLORIDA, RICHARD B. STONE, SECRETARY OF STATE OF

THE STATE OF FLORIDA, ROBERT SHEVIN, ATTORNEY GENERAL OF THE STATE OF FLORIDA, FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, THOMAS D. O'MALLEY, TREASURER OF THE STATE OF FLORIDA, FLOYD T. CHRISTIAN, COMMISSIONER OF EDUCATION OF THE STATE OF FLORIDA, AND DOYLE CONNOR, COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, COMPRISING THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, CREATED UNDER CHAPTER, F.S., GREETING:

WHEREAS upon Petition filed herein by Petitioner-Relator it has been made to appear that:

1. Relator is Metropolitan Dade County, a political subdivision of the State of Florida.

2. Respondents are REUBIN O'DONOVAN ASKEW as the Governor of the State of Florida, RICHARD B. STONE as Secretary of State of the State of Florida, ROBERT SHEVIN as Attorney General of the State of Florida, FRED O. DICKINSON, JR. as Comptroller of the State of Florida, THOMAS D. O'MALLEY as Treasurer of the State of Florida, FLOYD T. CHRISTIAN as Commissioner of Education of the State of Florida, and DOYLE CONNOR as Commissioner of Agriculture of the State of Florida, as and constituting the Board of Trustees of the Internal Improvement Trust Fund, created by Section 253.02, F.S.

3. Jurisdiction of this Court is invoked under the provisions of Article V, Section 4, Subsection 2 of the

Constitution of the State of Florida, in that the Respondents are State officers and comprise the Board of Trustees of the Internal Improvement Trust Fund, a board within the purview and meaning of this constitutional provision.

4. Respondents as such Trustees are charged with the administration of the trust fund specifically described in Section 253.01, Florida Statutes. Under the provisions of Section 253.02, Respondent Trustees are granted the "power to sell and transfer said lands" referred to in Section 253.01 "to the purchasers and receive payment for the same."

5. In December, 1961 the prior Trustees of the Internal Improvement Trust Fund, not those presently constituting the Board, granted an option to Aerojet-General Corporation to purchase the following described property, situated in Dade County, Florida, which constitutes part of the property designated and described in Section 253.01, F.S.:

> Sections 1 through 14, Township 57 South, Range 37 East; Sections 17 through 20 Township 56 South, Range 37 East; Sections 24 through 36, Township 56 South, Range 37 East; W½ of Section 5, Township 59 South, Range 38 East; Section 6, Township 59 South, Range 38 East.

This option was for a term of ten years and for a purchase price of $50. per acre. No legislative authority or power was then or ever has been vested in the Trustees to validly grant such an option.

6. Notwithstanding the existence of the alleged option, the Legislature of the State of Florida, in the exercise of its police power, enacted in 1965 Section 253.111, Florida Statutes, which provides in part as follows:

> "The Board of Trustees of the Internal Improvement Trust Fund of the State shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the County in which the land is situated to receive such land for public purposes . . . ."

At the time of the enactment of this statute and at the present time, the Board of Trustees of the Internal Improvement Trust Fund hold title to the above described property. The alleged option, above referred to, cannot operate to oust the Legislature of its power to require the Trustees to afford to Dade County an opportunity to acquire these lands for public purposes. This statute (a) denies the power of the Respondent State Board of Trustees to execute the alleged option, (b) even though the alleged option has been executed prohibits the Respondent Trustees from conveying title to such lands upon purported exercise of this option without first affording an opportunity to Petitioner to acquire these lands for public purposes, and (c) is the exercise of the police power to protect public lands from being conveyed to private interests when they are needed and desired by the County for public purposes.

7. Respondent Trustees have not afforded to Dade County an opportunity to acquire these lands for public purposes and Respondents will in the near future convey

these lands to Aerojet-General Corporation pursuant to the terms of this option and under the order and judgment of the U. S. District Court for the Northern District of Florida and affirmed by the U. S. Court of Appeals for the Fifth Circuit.

8. Petitioner was not a party to the action in the U. S. District Court and the judgment rendered by the U. S. District Court is not binding upon the Petitioner and does not constitute a judgment forfeiting the Petitioner's right to acquire the above described lands for public purposes.

9. The right of Petitioner to acquire these lands for public purposes under the provisions of Chapter 253, Florida Statutes, is prior to and supersedes any right or interest of Aerojet-General Corporation to acquire these lands.

10. The interpretation and construction of this Florida Statute is purely a State matter governed by State law, the final arbiter of the meaning of this statute, the powers of Respondent Trustees, and the effect of Section 253.111 being vested in the Supreme Court of Florida.

11. The Relator, Metropolitan Dade County, has no other plain, complete, speedy, and adequate remedy.

12. The issues here involved are not issues of fact requiring the taking of testimony.

13. The Relator, Metropolitan Dade County, and the people of Dade County will sustain injury and damage if they are denied the use and ownership opportunity of this land.

NOW, THEREFORE, this is to command you the Honorable REUBIN O'DONOVAN ASKEW, Governor of the State of Florida, RICHARD B. STONE, Secretary of State of the State of Florida, ROBERT SHEVIN, Attorney General of the State of Florida, FRED O. DICKINSON, JR., Comptroller of the State of Florida, THOMAS D. O'MALLEY, Treasurer of the State of Florida, FLOYD T. CHRISTIAN, Commissioner of Education of the State of Florida, and DOYLE CONNOR, Commissioner of Agriculture of the State of Florida, comprising the Board of Trustees of the Internal Improvement Trust Fund, created under Chapter 253, F.S., to afford Dade County the right to acquire these lands or show cause, by return and brief, if any you have, on or before July 5, 1972, why Peremptory Writ of Mandamus commanding the same to be done by you should not issue.

WITNESS the Honorable B. K. Roberts, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 12th day of June, 1972.

/s/ Sid J. White

Clerk of the Supreme Court
of Florida.

A TRUE COPY
Attest:
SID J. WHITE, Clerk
Supreme Court of Florida

by /s/ Signature illegible

Deputy Clerk

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

Case No. 42,461

STATE OF FLORIDA ex rel METROPOLITAN DADE COUNTY, a political instrumentality of the State of Florida,

Petitioner,

vs.

REUBIN O'DONOVAN ASKEW, et al., comprising the Board of Trustees of the Internal Improvement Trust Fund,

Respondents.

MEMORANDUM OF LAW OF AMICUS CURIAE

This Memorandum of Law of Amicus Curiae is filed by Mershon, Sawyer, Johnston, Dunwody & Cole, attorneys for Aerojet-General Corporation (hereafter, "Aerojet"), as amicus curiae pursuant to motion and order of this Court.

It is difficult to decide where to start discussing the issues presented to this Court in form of a "Third Party Complaint" and a request to amend the consent alternative writ heretofore entered in the cause. On the question of whether Aerojet is a proper, necessary or indispensable party in a mandamus action by Dade County against the Trustees of the Internal Improvement Fund, on the theory that the county has a right to buy, pursuant to a 1965 statute, lands which were optioned to Aerojet in 1961, these issues are immediately confronted:

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1. The clear legal duty owed the County, if any, is one imposed on the Trustees by a statute (§253.111, Fla. Stats.) which does not and could not apply to private persons such as Aerojet. The fact that the lands involved have been deeded to Aerojet pursuant to a federal court judgment is a defense of the Trustees to the issuance of a peremptory writ ((State ex rel. Sherril v. Milam, 113 Fla. 491, 153 So. 125 (1933); Florida ex rel. Dixon v. Trustees of the Internal Improvement Fund, 20 Fla. 402 (1884)), but that fact does not amend the statute to impose any duty on private persons.

2. Original mandamus proceedings in the Florida Supreme Court may be brought only against state officers (Art. V, §4, Florida Constitution; State v. Cochran, 114 So.2d 797 (Fla. 1959); Cf., English v. Bryant, 152 So.2d 167 (Fla. 1963)), and so a claim by the County in mandamus against Aerojet, if any there could be, could not be made in this Court.

3. The Florida Appellate Rules (Rule 4.5) do not provide for third party practice. To the extent that this proceeding is properly before this Court, procedure in it is governed by Rule 4.5, F.A.R., and so the "Third Party Complaint" respondents wish to have served on Aerojet is not a pleading which is permitted in this proceeding.

4. The relator's request for amendment of the alternative writ herein (a writ entered after consent thereto by respondents), is not a procedure permitted by Rule 4.5, F.A.R. Relator says that Rule 1.660(c), Florida Rules of Civil Procedure, authorizes amendment of the alternative writ herein; but Rule 1.660, Fla. R.C.P., by its own terms, applies to proceedings in mandamus in circuit courts. As

pointed out above, mandamus proceedings in this Court are procedurally governed by Rule 4.5, F.A.R., which does not contain a provision for amendment of the alternative writ. In fact, Rule 4.5, F.A.R. does not provide for amending mandamus pleadings at all.

5. The relator's request for amendment of the alternative writ does not in any event state a prima facie case for issuance of an alternative writ of mandamus against Aerojet, and thus the alternative writ could not be so amended even if the procedural rules allowed for amendment. Rule 4.5(3), F.A.R. conditions the issuance of an alternative writ on statement in the petition of a prima facie case for mandamus. The relator's request does no more than allege that the resopndent has purportedly filed a "Third Party Complaint" against Aerojet, and therefore the alternative writ should be amended. The "Third Party Complaint" is not a proper procedure in this cause, as noted above, and so reference to it could not breathe life into the relator's request for amendment which otherwise has no prima facie vitality of its own.

6. Third party practice, as allowed by the rules of civil procedure, is predicated on the concept of third party liability to the defendant/third party plaintiff. The issues of liability between respondent/"third party plaintiff" and Aerojet/"third party defendant" regarding the realty which relator seeks to purchase have been finally adjudicated between respondent and Aerojet, and are res judicata. Respondents are estopped to re-litigate with Aerojet any issues which were or could have been litigated in the prior action between them which resulted in judgment for Aerojet and conveyance of the property. Miami Retreat Foundation v. Ervin, 62 So.2d 748 (Fla. 1952); Litt v. Tarson,

97 So.2d 46 (Fla.Appl 3rd 1957). Since Aerojet could under no circumstances be liable to respondents on their third party claim, Aerojet is not a proper third party defendant, even assuming arguendo that a third party action could be instituted in this proceeding.

Relator commenced this action on June 9, 1972, seeking mandamus to compel the performance of an alleged legal duty of respondents, purportedly arising by virtue of §253.111, Fla. Stats. That statute was enacted in 1965, and provides that when respondents desire to offer lands held by them for sale, such lands must first be offered to the County in which they lie. If such County wishes to buy the lands, and if a plan for development of the land for certain public purposes is authorized and funded by the County, then the County is given the right to buy such lands before they are offered for sale to private parties. §253.111(3). The relator has not alleged that, if offered the opportunity to buy the lands involved, it would adopt a plan for development which complies with the statutory requirements. In fact, at the County Commission meeting which immediately preceeded this action a vote of the Commission was not even taken on instituting the action. Rather, this action is the idea of one Commissioner which has not even been approved by a majority of the Commission. Notwithstanding this and a number of other things, respondents filed their consent to entry of an alternative writ of mandamus on the same day the petition was filed; and an alternative writ issued thereafter.

One rather important problem with the relator's claim for enforcement of the 1965 statute is that the lands involved were, pursuant to published notice of bids, op-

tioned to Aerojet in 1961, for the term of ten years, at a specified purchase price. Thus, in 1961, four years before the enactment of the statute relator seeks hereby to enforce, Aerojet became a lessee-optionee in possession of the premises, with the legal power to exercise its option at any time during the option period, and upon doing so, to become the equitable owner of the lands in possession of them. See, Orlando Realty Board Bldg. Corp v. Hilpert, 93 Fla. 954, 113 So. 100 (1927); Behrman v. Max, 102 Fla. 1094, 137 So. 120 (1931). By definition, an option is an offer to sell lands on specified terms, which by contract is extended to optionee for the period of the option. 33 Fla. Jur. Vendor and Purchaser, §15. Thus, the offer to sell the subject property was made in 1961, four years before the enactment of the statute upon which relator makes its claim. By contract, the offer remained open during the contract term, and the subsequent enactment of a statute could not affect that contractual right. The statute could not apply to a case in which respondents had no discretion to sell or refuse to sell, and no discretion to choose a buyer. Yet that is precisely the situation with respect to the Aerojet lease-option. The lease-option was a binding, specifically enforceable contract under which respondents were legally and equitably obliged to perform. Aerojet-General Corp. v. Askew, 318 F.Supp. 55 (N.D. Fla. 1970), aff'd. 453 F.2d 819 (5th Cir. 1971).

Another important deficiency in relator's claim for mandamus is that the respondents do not have title to the lands relator say it may want to buy, and so respondent cannot offer the lands for sale to relator. This action was instituted by relator after respondents (constituting the membership of the Trustees of the Internal Improvement Fund and the State Board of Education) had liti-

gated with Aerojet the issue of the specific enforceability of the lease-option contract made by them in 1961. Dade County took no action at the time the option was exercised, (September 8, 1969) or at the time Aerojet filed suit, or at the time that Aerojet was granted judgment by the trial court, (September 20, 1970) or at the time that the U.S. Court of Appeals affirmed the judgment (March 9, 1972). This case is and has been a matter of widespread notoriety in Dade County, and these proceedings were brought only after the Supreme Court of the United States had ordered the judgment to be enforced rather than stayed during certiorari proceedings there. Relator and respondents have been engaged in friendly "litigation" here. Respondents consented in writing to issuance of an alternative writ herein, and has filed a response which purports to admit that relator is entitled to purchase the lands which Aerojet owns in fee simple. Aerojet has title to the lands pursuant to the judgment of specific performance referred to above, and this itself is a defense to relator's petition, but respondents have not raised it as a defense. Instead, relator and respondents are doing their level best to involve Aerojet in these mandamus proceedings.

Based on the position taken by relator and respondents, that the 1965 statute applies to the 1961 offer of respondents to Aerojet to purchase certain lands, the impact of the 1965 statute would be that counties would be entitled to maintain mandamus proceedings in this Court to compel the undoing of all contracts for sale of respondents' lands which occurred prior to the enactment of the 1965 statute. If this statute applies to an option offer which was bid and contracted four years before the enactment of the statute giving counties first refusal on

sale of respondents' lands, there is no logical reason why mandamus would not lie to compel the offering of all other lands disposed of by respondents prior to the statute. Relator and Respondents argue that Aerojet should be in these proceedings on the theory that Aerojet has title to the property and thus allegedly owes the County the legal duty to offer its property to the County for sale. That theory is as absurd as one which says that all persons holding legal title to lands sold by respondents without giving the County first refusal are subject to mandamus to compel the giving of such an offer. Respondents had no authority to change their minds about offering the property to Aerojet, just as they would have no authority to change their minds about selling other lands to other persons. Nor does the statute, which applies to future offerings, create any right in the relator county to compel Aerojet or any other private party to offer to divest itself of contract rights bought and paid for.

In this context, therefore, Aerojet is not a proper party in this mandamus proceeding, as a matter of law. In fact, the conveyance of the property to Aerojet moots this proceeding, for this Court has often ruled that a peremptory writ will not issue when it is impossible of performance, Bradenton v. Oliver, 153 So. 165 (Fla. 1934); Fieldhouse v. Sewell, 171 So. 298 (Fla. 1936); Walker v. Best, 163 So. 696 (Fla. 1935). In Florida ex rel. Dixon v. Trustees of the Internal Improvement Fund, 20 Fla. 402 (1884), the Trustees contracted to convey property to one party, then conveyed it to another. Mandamus was brought to compel conveyance to the relator:

> . . . But (the Trustees) have no title to convey. Both the legal and equitable title have gone out

> of them to Mrs. Titus. There can be no plainer proposition that that they cannot grant what they have not, and of which they have no control. Nothing remains in them to convey . . . Id, at 404, Emphasis added.

Similarly, in State v. Milam, 153 So. 125 (1933), the Court said:

> If the allegations of fact found in the answer were sufficient to show that the respondents cannot legally comply with the mandate of the alternative writ . . . then the answer or return is sufficient and a peremptory writ of mandamus would not issue to compel . . . an impossible act, or an act which under the law, they cannot perform. Id, at 128, Emphasis supplied.

Here, the respondents could not under law abide by the alternative writ, and cannot in fact abide by a peremptory writ. They were under the dictates of a judgment to convey the property to Aerojet, which they did under Court order. They could not convey the property to Aerojet and convey it to the County, and thus under the law of the Milam case they had complete defense to this petition.

Procedurally, as noted above, Aerojet cannot be joined in this proceeding. Aerojet is under no statutory duty to relator and thus relator could not make a prima facie case against Aerojet for issuance of an alternative writ. Rule 4.5b(3), F.A.R. Even if a prima facie case could be plead, Aerojet is not a state officer and thus a mandamus action against Aerojet may not be brought in this Court. Article

V, §4, Florida Constitution, and cases cited above. There is no procedure under this Court's rules for amending mandamus pleadings in any event, though the procedure is specifically provided in the rules applicable to circuit court mandamus proceeding. Rule 4.5, F.A.R., Rule 1.660, F.R.C.P.

No third party practice is permitted under the appellate rules governing this proceeding, so the "third party complaint" filed by respondents is improper on its face. No summons should be issued on such a pleading. Indeed, there is no rule authority for issuance of summonses out of this Court, though the rules provide for issuance of summonses from trial courts. Even if third party practice were available in this Court, this case is obviously not a case for its use, for third party practice is based on theory that the third party defendant is liable to defendant/third party plaintiff for all or part of the claims of plaintiff. The issues between respondents (purported third party plaintiffs) and Aerojet (purported third party defendant) as to their rights in the subject lands, have been finally adjudicated and are res judicata. Aerojet-General Corp. v. Askew, supra. Thus, with respect to the matters in the third party complaint, Aerojet could not have any liability to respondents, as a matter of law.

Accordingly, your amicus curiae respectfully suggests that the request for issuance of a third party summons be denied, and the request for amendment of the alternative writ herein be denied.

Respectfully submitted,

MERSHON, SAWYER,

JOHNSTON, DUNWODY
& COLE
Attorneys, as amicus curiae
1600 First National Bank Building
Miami, Florida 33131

By_____
George W. Wright, Jr.

By_____
Karl B. Block, Jr.

WE HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law Amicus Curiae was mailed this 29th day of June, 1972 to: M. STEPHEN TURNER, ESQ., General Consel, Board of Trustees, Eliott Building, Tallahassee, Florida, BARRY S. RICHARD, ESQ., Deputy Attorney General, The Capitol, Tallahassee, Florida, STUART L. SIMON, ESQ., County Attorney, Dade County Courthouse, Miami, Florida and MARVIN S. WAITS, Clerk U.S. District Court, Northern District of Florida, Tallahassee Division, Tallahassee, Florida.

_____
Of Counsel

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO: 42,461

STATE OF FLORIDA ex rel METROPOLITAN DADE COUNTY, a political instrumentality of the State of Florida,

Petitioner,

vs.

REUBIN O'D. ASKEW, et al, comprising the Board of Trustees of the Internal Improvement Trust Fund,

Respondents,

vs.

AEROJET-GENERAL CORPORATION, a foreign corporation,

Third Party Respondents.

MOTION TO DISMISS AND/OR QUASH THIRD PARTY COMPLAINT

Aerojet-General Corporation (hereinafter "Aerojet") named as a third-party respondent in a Third-Party Complaint filed in the above entitled cause by the Respondents, Reubin O'D. Askew, et al., comprising the Board of Trustees of the Internal Improvement Trust Fund (hereinafter "the Trustees", moves the Court for an entry of an order dismissing and/or quashing said Third Party Complaint on the following grounds:

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1. Even if a Third Party Complaint could properly be filed in a mandamus action instituted in this Court, this Court lacks jurisdiction over the person of Aerojet and there is a lack of process or insufficiency of process and service of process upon Aerojet in that:

A. No summons or other process for said Third Party Complaint has been issued by this Court or by the Clerk thereof to Aerojet.

B. No summons or process for said Third Party Complaint has been served upon Aerojet in the manner provided by law and by an officer authorized by law to serve said summons or other process.

C. The alleged mailing of a copy of the Third Party Complaint, per letter dated June 26, 1972 (copy of which is attached hereto as Exhibit A) to Aerojet, c/o The Corporation Company, Jacksonville, Florida, by counsel for the Trustees does not constitute, and is an insufficient, service of said Third Party Complaint upon Aerojet.

D. Said Third Party Complaint was not served along with any summons or process issued to Aerojet by this Court or the Clerk thereof for said Third Party Complaint in the manner provided by law or by an officer authorized by law to serve such Third Party Complaint.

E. Original mandamus proceedings in this Court may be brought only against state officers (Article V. Sec. 4, Florida Constitution; Rule 4.5b, F.A.R) and so a claim in mandamus against Aerojet, if any there could be, could not be made in this Court.

2. This Court lacks jurisdiction over the subject matter of this cause insofar as the purported Third Party Complaint against Aerojet is concerned and over the person of Aerojet and said Third Party Complaint fails to state a cause of action against Aerojet in that:

A. Original mandamus proceedings in this Court may be brought only against state officers and, therefore, a claim in mandamus against Aerojet, a private party, if any there could be, could not be made in this Court.

B. Neither Article V. Section 4, Florida Constitution, nor Rule 4.5b, Florida Appellate Rules, under and pursuant to which this mandamus action was instituted in this Court by Dade County, nor any other provisions of the Florida Appellate Rules provide for third party practice. Therefore, a third party complaint is not a pleading authorized or permitted in a mandamus proceeding instituted in this Court.

C. It affirmatively appearing from the allegations of the County's Petition for Alternative Writ of Mandamus and the Trustee's Third Party Complaint that the subject lands were leased to Aerojet for the term of ten (10) years with an option to purchase at a specified purchase price during the lease term, in 1961, four (4) years before the enactment of Section 253.111, Florida Statutes, said statute has no application to and could not affect the contractual and property rights acquired by Aerojet under said lease-option.

D. Mandamus lies only to compel the performance by respondent of a clear legal duty and there is no

duty imposed by Section 253.111 Florida Statutes, even if applicable to the subject lands, upon Aerojet or any one other than the Trustees to first offer the subject lands to Dade County for purchase.

E. Since Aerojet could, under no circumstances, be liable to the Trustees on their Third Party Complaint, Aerojet is not a proper Third Party Defendant, even assuming arguendo that a Third Party Complaint could be filed in this mandamus proceeding in this Court.

F. Neither the County's Petition for Alternative Writ of Mandamus or the Trustee's Third Party Complaint have alleged the compliance or possibility of compliance with all of the conditions precedent prescribed by the provisions of Sec. 253.111, Florida Statutes for the offer of sale by the Trustees of the subject lands to Dade County.

G. Third party practice, even as allowable by the Florida Rules of Civil Procedure, which is applicable only to proceedings in trial courts (Rule 1.010), is predicated upon the concept of third party liability to the Defendant-Third Party Plaintiff and the issues of liability between the Defendant-Third Party Plaintiff (Trustees) and the Third Party Defendant (Aerojet) regarding the subject property have been litigated and finally adjudicated between the Trustees and Aerojet (Aerojet-General Corp. v. Askew (N.D. Fla., 1970) 318 F. Sup. 55 aff'd, 5 Cir. Fla., 1971) 453 F.2d 819), and the Trustees are estopped to relitigate said issues sought to be litigated by the Third Party Complaint filed by the Trustees against Aerojet in this proceeding.

H. The judgment of the Federal Court in Aerojet-General Corp. v. Askew (N.D. Fla., 1970) 318 F. Sup. 55 aff'd (5 Cir. Fla., 1971) 453 F. 2d 819) is res judicata of those issues raised and sought to be litigated by the Third Party Complaint filed herein by the Trustees against Aerojet and constitutes a bar to said Third Party Complaint.

I. It affirmatively appears from the allegations of the Trustees' return to the alternative writ of mandamus and their Third Party Complaint, herein, that Trustees do not have title to the lands which the county seeks to have offered to it for purchase and that fee simple title to said lands has heretofore been conveyed to and vested in Aerojet under and pursuant to order of the Federal Court. (Aerojet-General Corp. v. Askew (N.D. Fla., 1970) 318 F. Sup. 55, aff'd (5 Cir. Fla., 1971) 453 F.2d, 819).

J. It affirmatively appears that the Trustees, having heretofore conveyed the fee simple title to the subject lands to Aerojet, cannot possibly perform the alleged duty of the Trustees to first offer for sale to the County said lands, and, therefore, no preemptory writ of mandamus can be issued against the Trustees by this Court and the Trustees consequently cannot sustain any liability to the county for which it could assert liability over against Aerojet by way of a Third Party Complaint.

Mershon, Sawyer, Johnston,
Dunwody & Cole
1600 First National Bank Building
Miami, Florida 33131

BLEED THROUGH POOR COPY

Attorneys for Third Party
Respondent, Aerojet-General
Corporation

By /s/ George W. Wright, Jr.
George W. Wright, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss and/or Quash Third Party Complaint was mailed this 14th day of July, 1972 to:

Robert L. Shevin,
Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

M. Stephen Turner
General Counsel
Board of Trustees
Elliot Building
Tallahassee, Florida 32304

Stuart L. Simon, Esq.
County Attorney
Dade County Courthouse
Miami, Florida

/s/ George W. Wright, Jr.
George W. Wright, Jr.

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 42,461

STATE OF FLORIDA ex rel METROPOLITAN DADE COUNTY, a political instrumentality of the State of Florida,

Petitioner,

vs.

REUBIN O'D. ASKEW, et al., comprising the Board of Trustees of the Internal Improvement Trust Fund,

Respondents,

vs.

AEROJET-GENERAL CORPORATION, a foreign corporation,

Third Party Respondent.

BRIEF OF THIRD PARTY RESPONDENT, AEROJET-GENERAL CORPORATION, IN SUPPORT OF MOTION TO DISMISS AND OR QUASH THIRD PARTY COMPLAINT

MERSHON, SAWYER,
JOHNSTON, DUNWODY
& COLE
1600 First National Bank Building,
Miami, Florida 33131,
Attorneys for Third Party
Respondent, Aerojet-General
Corporation.

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INTRODUCTION

The parties to this mandamus proceeding will be hereinafter referred to as follows:

Petitioner, Metropolitan Dade County—"Dade County" or "the county".

Respondents and Third Party Complainants, Board of Trustees of the Internal Improvement Trust Fund—"Trustees"

Third Party Respondent, Aerojet-General Corporation—"Aerojet".

STATEMENT OF THE CASE AND FACTS

On June 9, 1972, Dade County filed in this Court against the Trustees its petition for an alternative writ of mandamus under and pursuant to Article V, Section 4(2), Florida Constitution, and Rule 4.5b, Florida Appellate Rules.[1]

The county alleged that the Trustees, in December, 1961, granted to Aerojet for a term of ten years an option to purchase, at a price of $50.00 per acre, certain lands located in Dade County, Florida, constituting a part of the Internal Improvement Trust Fund created by the provisions of §253.01, Florida Statutes. In 1965, it was alleged that the Florida legislature enacted §253.111, Florida

[1]Rule 4.5b provides in pertinent part:
"(1) When Entertained. No original petition in mandamus will be entertained by the Supreme Court unless a state officer, state board, state functionary, or an agency authorized to represent the public generally, is named as respondent."

Statutes, which, in substance required the Trustees, before selling any land in which they hold title, to first afford an opportunity to the county in which the land is situated to receive same for designated public purposes.

The county avered that §253.111 required the Trustees to afford to Dade County an opportunity to acquire those lands optioned to Aerojet four years previously, which the Trustees had not done and that the Trustees would, in the near future, convey those lands to Aerojet under and pursuant to the contract between Aerojet and the Trustees and pursuant to judgment of the United States District Court for the Northern District of Florida, as affirmed by the United States Court of Appeals for the Fifth Circuit. The county contended that its right to be afforded the opportunity to acquire such lands superceded the right and interests of Aerojet to acquire same. The county prayed for the issuance of an alternative writ of mandamus directing the Trustees to afford to the county the right to acquire such lands or show cause why they should or could not do so.

In this "friendly suit" between the county and the Trustees, the Trustees, on the same day this mandamus action was instituted, filed a written waiver of any notice of hearing upon the petition for alternative writ of mandamus and its consent to the issuance of an alternative writ. This Court, on June 12, 1972, issued an alternative writ of mandamus commanding the Trustees to afford Dade County the right to acquire the subject lands or to show cause, by return and brief, on or before July 5, 1972, why preemptory writ of mandamus commanding the same to be done should not issue. On June 22, 1972, the Trustees filed their written return to the alternative writ, alleging that, at the time the mandamus action was instituted, an order of the United States District Court for the Northern

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District of Florida, dated June 7, 1972, required them to convey by fee simple deed title to the subject lands to Aerojet within fifteen days thereafter, pursuant to summary judgment for Aerojet entered by that Court, affirmed by the United States Court of Appeals for the Fifth Circuit. Aerojet-General Corp. v. Askew et al., (N.D.Fla. 1970) 318 F.Supp.55, aff'd. (5 Cir. Fla., 1971) 453 F.2d 819. By order of the Federal District Court dated June 16, 1972, the Trustees were again directed to execute and deliver a fee simple deed conveying title to the subject lands to Aerojet and that upon their failure to do so, a commissioner to execute said deed in their place and stead would be appointed by that Court pursuant to the provisions of Rule 70, Federal Rules of Civil Procedure. A petition for reconsideration of said order filed by the Trustees was denied by the Federal District Court and on June 20, 1972, the Clerk of the United States District Court for the Southern District of Florida was appointed as commissioner to execute and deliver to Aerojet a deed to the subject lands with like effect as if done by the Trustees themselves pursuant thereto. Said deed was executed and delivered to Aerojet on the same date. The Trustees conclude their return, therefore, by alleging that Aerojet is liable for their inability to offer said lands to Dade County and pray that they be absolved from any duty to offer said lands to the county by reason of their inability to do so.

With their return to the alternative writ, the Trustees filed in the above cause a Third Party Complaint against Aerojet, setting forth the above history of the proceedings leading up to the conveyance of title to the subject lands to Aerojet, and avering that Aerojet is accountable for their alleged inability to offer said lands to Dade County. The Trustees, by said Third Party Complaint, request this

Court to "declare Third Party Respondent responsible to Metropolitan Dade County for the interest in the aforementioned lands conferred by §253.111, Florida Statutes, and obligated to take same action under said statute as Complainants would have had to take if not required to deed said lands to Third Party Respondent."

No summons or other process was issued for said Third Party Complaint by this Court or the Clerk thereof, and the Trustees have purportedly attempted to effect service of said Third Party Complaint, without summons or other process being issued or served, by sending a copy of said Third Party Complaint by mail to Aerojet, care of the Corporation Company, Jacksonville, Florida. (See Exhibit A to Aerojet's Motion to Dismiss and/or Quash Third Party Complaint.)

POINTS INVOLVED

POINT I

WHETHER OR NOT THIRD PARTY PRACTICE OBTAINS IN MANDAMUS PROCEEDINGS INSTITUTED IN THE SUPREME COURT OF FLORIDA SO AS TO AUTHORIZE THE FILING OF A THIRD PARTY COMPLAINT HEREIN?

POINT II

WHETHER OR NOT SECTION 253.111 FLORIDA STATUTES IS APPLICABLE TO A WRITTEN OPTION TO PURCHASE THE SUBJECT LANDS GRANTED AEROJET BY THE TRUSTEES FOUR YEARS PRIOR TO THE STATUTE'S ENACTMENT?

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POINT III

WHETHER OR NOT SECTION 253.111 FLORIDA STATUTES, EVEN IF APPLICABLE TO THE SUBJECT LANDS, IMPOSES ANY DUTY UPON AEROJET TO OFFER THE SUBJECT LANDS FOR SALE TO DADE COUNTY SO AS TO WARRANT MANDAMUS PROCEEDINGS AGAINST AEROJET?

POINT IV

WHETHER OR NOT THE JUDGMENT OF THE FEDERAL COURTS ORDERING SPECIFIC PERFORMANCE OF THE TRUSTEES' CONTRACT WITH AEROJET IS RES JUDICATA OF AND ESTOPS THE TRUSTEES FROM ATTEMPTING TO LITIGATE THE ISSUES SOUGHT TO BE RAISED BY THE THIRD PARTY COMPLAINT?

POINT V

WHETHER OR NOT THE CONVEYANCE OF THE SUBJECT LANDS TO AEROJET RENDERS THIS MANDAMUS PROCEEDING AND THE THIRD PARTY COMPLAINT HEREIN MOOT AND ACADEMIC?

POINT VI

WHETHER OR NOT THIS COURT LACKS JURISDICTION OVER THE PERSON OF AND THERE IS NO PROCESS OR INSUFFICIENT PROCESS AND SERVICE OF PROCESS UPON AEROJET?

ARGUMENT

POINT I

THIRD PARTY PRACTICE DOES NOT OBTAIN IN MANDAMUS PROCEEDINGS INSTITUTED IN THE SUPREME COURT OF FLORIDA SO AS TO AUTHORIZE THE FILING OF A THIRD PARTY COMPLAINT HEREIN.

The county's petition for alternative writ of mandamus was filed under the provisions of Article V, Section 4(2), Florida Constitution, and Rule 4.5b, Florida Appellate Rules. Under the Constitution and this rule, this Court is without jurisdiction to entertain a petition for writ of mandamus or to issue a writ of mandamus unless a state officer, board, commission, or other agency authorized to represent the public generally is named as a respondent. While the District Courts of Appeal have jurisdiction to issue writs of mandamus (Article V, Section 5[3]), mandamus proceedings in those courts are also governed by Rule 4.5, Florida Appellate Rules. Otherwise, all mandamus proceedings are governed by the provisions of Rule 1.660, Florida Rules of Civil Procedure, which rules apply only to suits "in the Circuit Courts and Civil Courts of Record and other trial courts."

There is no provision whatever in the Florida Appellate Rules for Third Party Practice, i.e., the filing of the Third Party Complaint, even in mandamus. While provision for Third Party Practice is made in the Florida Rules of Civil Procedure (Rule 1.180), those rules do not govern proceedings in this Court, but only in the Circuit Courts,

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Civil Courts of Record, and other trial courts. If third party practice were intended to be permitted in mandamus proceedings in this Court under the Florida Appellate Rules, clearly provision would have been made therein for same.

POINT II

SECTION 253.111, FLORIDA STATUTES, IS NOT APPLICABLE TO A WRITTEN OPTION TO PURCHASE THE SUBJECT LANDS GRANTED AEROJET BY THE TRUSTEES FOUR YEARS PRIOR TO THE STATUTE'S ENACTMENT.

It is clear from the face of the county's petition for alternative writ of mandamus and the Turstees Third Party Complaint against Aerojet that the Statute (Section 253.111, Florida Statutes), upon which the county predicates its claim for relief by way of mandamus, has no application to the option-contract between the Trustees and Aerojet. The option to purchase the subject lands at a specified price per acre, pursuant to competitive bids, which the Trustees had the right to accept or reject,[1] granted to Aerojet in the ten-year lease of the subject lands was entered into between the Trustees and Aerojet on December 21, 1961. Appropriate and valid notice of the sale and request for bids was published by the Trustees (and Board of Education) in compliance with statutory requirements, and the lease-option contract was clearly within the powers of the Trustees (and Board of Education to execute. [Aerojet-General Corporation v. Askew, supra]. Thus, four years before the enactment of the statute relied upon by the county and under which the Trustees

[1]Section 270.09, Florida Statutes.

assert liability over to Aerojet, Aerojet became a lessee-optionee in possession of the property, with the legal power to exercise its option at any time during the option period; and upon doing so, to become the equitable owner of the lands in its possession. [See Orlando Realty Board Bldg. Corp. v. Hilpert (1927), 93 Fla. 954, 113 So. 100; Behrman v. Max (1931), 102 Fla. 1094, 137 So. 120]. By definition, an option to purchase is an offer to sell lands on specified terms, which by contract is extended to the optionee for the period of the option. [33 Fla. Jur., Vendor and Purchaser, Section 15]. Accordingly, the offer to sell the subject lands was made in 1961, four years before the enactment of the statute sought to be invoked by the county against the Trustees and by the Trustees against Aerojet in its Third Party Complaint. By contract, the offer remained open during the contract term (ten years), and the subsequent enactment of such a statute as Section 253.111 could not affect that contractual right. The statute cannot apply to a case in which the Trustees had no discretion to sell or refuse to sell and no discretion to choose a buyer. Yet, that is precisely the situation with respect to the Aerojet lease-option. It was a binding, specifically enforceable contract which the Trustees were legally and equitably obliged to perform. [Aerojet-General Corporation v. Askew, supra.

Section 253.111 has no application to the lease-option contract between the Trustees and Aerojet, since it, by its own terms, provides only for the Trustees' notification to the Board of County Commissioners of the availability of such land "before consideration of any private offers." [Section 253.111(1)]. In the case at bar, the Trustees considered and accepted Aerojet's offer in 1961, four years

before Section 253.111 was ever enacted. On its face, it clearly has no application to the instant lease-option agreement between the Trustees and Aerojet.

Based upon the position taken herein by both the county and the Trustees that the 1965 statute applies to the 1961 offer of the Trustees to Aerojet for it to purchase the subject lands, the impact of the statute would be that counties could maintain mandamus proceedings in this Court to compel the undoing of all contracts for the sale of the Trustees' lands which occurred prior to the enactment of the 1965 statute. If it applies to an option offer which was bid and contracted for four years before the enactment of the statute giving counties the right of first refusal on the sale of lands belonging to the Trustees, there is no logical reason why mandamus would not lie to compel the offering of other lands disposed of by the Trustees prior to the statute's enactment. Both the county and the Trustees urge that Aerojet should be in this proceeding as a party on the theory that Aerojet has title to the property and allegedly owes the county the legal duty to offer its property to the county for sale. This theory is as absurd as one which says that all persons holding legal title to lands sold by the Trustees without giving the county the right of first refusal are subject to mandamus to compel the giving of such an offer. Trustees had no authority to change their minds about offering the property to Aerojet, just as they would have no authority to change their minds about selling other lands to other persons. Nor does the statute, which applies to future offerings by its own terms, create any right in either the county or the Trustees to compel Aerojet or any other private party to offer to divest itself of contract and property rights bought and paid for.

It is significant that neither the county nor the Trustees have alleged that, if the land were offered or could have been offered by the Trustees to the county, the county proposes to devote such lands to the requisite public purposes required by the statute and has prescribed or would prescribe the plan of development and time schedule therefor in compliance with the statute. [Section 253.111(3), Florida Statutes]. In fact, at the County Commission meeting, which immediately preceded the institution of this action by the county, a vote of the County Commission was not even taken on instituting this action.[2] As appears from the transcript, this suit was the idea of one County Commissioner, which was not even approved by a majority of the Commission. The Trustees, working hand-in-hand with the county, were quick to file their consent to the entry of an alternative writ of mandamus on the very day the petition therefor was filed by the county. So it is, at this late date, that the county, with the cooperation of the Trustees, have improperly sought to apply to a private party the provisions of a statute clearly inapplicable to the lease-option contract between Aerojet and the Trustees—a statute which the Trustees obviously felt inapplicable for their failure to assert it during the extended litigation over the subject lands between Aerojet and the Trustees in the Federal Courts. [Aerojet-General Corporation v. Askew, et al., supra].

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[2]See certified transcript of discussion of this matter before the Board of County Commissioners for Dade County on June 6, 1972, attached hereto as Exhibit I.

POINT III

SECTION 253.111 FLORIDA STATUTES, EVEN IF APPLICABLE TO THE SUBJECT LANDS, DOES NOT IMPOSE ANY DUTY UPON AEROJET TO OFFER THE SUBJECT LANDS FOR SALE TO DADE COUNTY SO AS TO WARRANT MANDAMUS PROCEEDINGS AGAINST AEROJET.

Even if arguendo the provisions of Section 253.111, Florida Statutes, could have any application to the lands to which Aerojet now holds title, it serves as no basis for a writ of mandamus to compel Aerojet to offer for sale said lands to the county. The statute, by its own terms, where applicable, imposes the duty of offering lands to which the Trustees hold title and propose to sell, first to the county upon the Trustees—not upon any private person or party who either is offering to purchase such lands or has already purchased and received title to same. The fact that the subject lands have been heretofore deeded to Aerojet pursuant to Federal Court Judgment is a complete defense of the Trustees to the issuance of a pre-emptory writ of mandamus herein [State ex rel Sherril v. Milam (1933), 113 Fla. 491, 153 So. 125; Florida ex rel Dixon v. Trustees of the Internal Improvement Fund (1884), 20 Fla. 402], but that fact does not amend the statute to impose any duty on private persons. If the statute were applicable to the subject lands and the Trustees violated any duty owed by them to the county, the county conceivably could have some type of action against the Trustees for damages, but the Trustees' conveyance of the lands to a private party without first offering the same to the county could not amend the

statute so as to require such private party to offer its land for sale to the county or any other person. Since Section 253.111, Florida Statutes, is the entire predicate for the county's institution of this mandamus action and the Trustees' Third Party Complaint against Aerojet, both must fall, as no legal duty is imposed by that statute (or any other, for that matter) upon Aerojet to now offer lands to which it holds title to the county or anyone else. Mandamus lies only to compel the performance of a ministerial act or clear legal duty owed by the respondent. 21 Fla. Jur., Mandamus, Section 33, page 339. No clear legal duty to offer its lands for sale to the county is imposed upon Aerojet by statute. Moreover, mandamus will lie only where there is no other adequate remedy. Reese v. Golden, (Fla. App. 1968), 209 So.2d 491. If the county has any complaint against the Trustees for violation by them of any duty owed to the county, or even against Aerojet because it acquired, pursuant to Federal Court Judgment, lands to which the county asserts a right of first refusal, mandamus will not lie.

POINT IV

THE JUDGMENT OF THE FEDERAL COURTS ORDERING SPECIFIC PERFORMANCE OF THE TRUSTEES' CONTRACT WITH AEROJET IS RES JUDICATA OF AND ESTOPS THE TRUSTEES FROM ATTEMPTING TO LITIGATE THE ISSUES SOUGHT TO BE RAISED BY THE THIRD PARTY COMPLAINT.

As heretofore pointed out, specific performance litigation between Aerojet and the Trustees has been pending in the Federal Courts since October of 1969. Judgment

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for Aerojet requiring specific performance was entered by the Federal District Court and affirmed unanimously by the United States Court of Appeals for the Fifth Circuit. [Aerojet General Corporation v. Askew, et al., supra]. An application for a stay of the mandate of the Court of Appeals was denied by both that Court and the United States Supreme Court. At no time during the proceedings in the Federal District Court and the United States Court of Appeals did the Trustees ever assert any obligation on their part to first offer the subject lands for sale to Dade County by virtue of the provisions of Section 253.111, Florida Statutes. Such assertion has not even been made by the Trustees in their pending petition for writ of certiorari in the United States Supreme Court to review the decision of the United States Court of Appeals. The issues of "liability," if any, between the Trustees and Aerojet regarding the subject lands which the county, with the Trustees' cooperation, now seek to have offered to it for purchase have been finally adjudicated between the Trustees and Aerojet and are res judicata. The Trustees cannot relitigate in this proceeding, or in any other proceeding, with Aerojet any issues which were or could have been litigated in the Federal Court action between them which resulted in the specific performance judgment for Aerojet and conveyance of the subject property to it. [Miami Retreat Foundation v. Ervin (Fla. 1952), 62 So.2d 748; Litt v. Tarson (Fla. Appellate 1957), 97 So.2d 46]. Since Aerojet could, under no circumstances, be liable to the Trustees on their Third Party Complaint, Aerojet is not a proper third party defendant, even if a third party action could properly be instituted in this mandamus proceeding.

POINT V

THE CONVEYANCE OF THE SUBJECT LANDS TO AEROJET RENDERS THIS MANDAMUS PROCEEDING AND THE THIRD PARTY COMPLAINT HEREIN MOOT AND ACADEMIC.

The admitted conveyance to Aerojet of the subject lands prior to the filing of the Third Party Complaint by the Trustees moots this mandamus proceeding. This Court has often ruled that a pre-emptory writ will not issue when it is impossible of performance. [Bradenton v. Oliver (Fla. 1934), 153 So. 165; Fieldhouse v. Sewell (Fla. 1936), 171 So. 298; Walker v. Best (Fla. 1935), 163 So. 696]. In Florida ex rel Dixon v. Trustees of the Internal Improvement Fund, supra, the trustees contracted to convey property to one party and then conveyed it to another. Mandamus was brought against the trustees to compel conveyance to the relator:

> "* * * But (the Trustees) have no title to convey. Both the legal and equitable title have gone out to them to Mrs. Titus. There can be no plainer proposition than that they cannot grant what they have not, and of which they have no control. Nothing remains in them to convey * * *. [20 Fla. at page 404]

Similarly, in State v. Milam, supra, this Court said:

> "If the allegations of fact found in the answer where sufficient to show that the respondents cannot legally comply with the mandate of the

> alternative writ * * * then the answer or return is sufficient and a pre-emptory writ of mandamus would not issue to compel * * * an impossible act, or an act which under the law, they cannot perform. [153 So. at page 128].

Here, the Trustees could not under the law abide by the alternative writ of mandamus and cannot in fact abide by pre-emptory writ. They were under the dictates of a Federal Court Judgment to convey the property to Aerojet, which they did under that Court's Order. They could not convey the property to Aerojet and also offer it for sale or convey it to Dade County, and thus, under the law in Milam, they have a complete defense to the alternative writ of mandamus. They cannot, to be sure, alter the fact that the lands have heretofore been conveyed to Aerojet and now rewrite the statutes so as to transfer over to Aerojet the alleged legal duty owed by the Trustees to Dade County.

POINT VI

THIS COURT LACKS JURISDICTION OVER THE PERSON OF AND THERE IS NO PROCESS OR INSUFFICIENT PROCESS AND SERVICE OF PROCESS UPON AEROJET.

It has been heretofore demonstrated that third party practice does not obtain in mandamus proceedings instituted in this Court. It is permitted only in civil actions instituted in the trial courts under the Florida Rules of Civil Procedure.[1] Even if third party practice, however,

[1]Rules 1.010, 1.180.

did obtain in mandamus proceedings instituted in this Court, it is clear that there is a lack of jurisdiction over the person of Aerojet. There has been no summons or process for such Third Party Complaint issued by this Court or by the Clerk thereof, nor any service of any such process upon Aerojet in the manner provided by law or by an officer authorized by law.

The Florida Appellate Rules, under which this mandamus proceeding was filed by Dade County in this Court, makes no provision for the issuance of summons or other process or service thereof upon a so-called third party respondent. If the third party practice provision (Rule. 1.180) of the Florida Rules of Civil Procedure were applicable to a mandamus proceeding in this Court, then the remainder of said rules, including those pertaining to the issuance and service of process, would necessarily be applicable to the Third Party Complaint filed by the Trustees herein. Rule 1.070(a), Florida Rules of Civil Procedure, requires:

> "Upon the commencement of the action summons other other process authorized by law shall be issued forthwith by the clerk or judge and delivered for service without praecipe."

As to service of such summons or other process, Rule 1.070(b) requires same to be made "by any officer authorized by law to serve process."

Rule 1.070(f) requires that at the time of personal service of process "a copy of the initial pleading shall be delivered to the party upon whom service is made."

Sections 48.021 and 48.031, Florida Statutes, provide by whom process must be made and the manner of service. Section 48.021 requires process to "be served by the

sheriff of the county or the constable of the district where the person to be served is found * * *." Section 48.031 provides:

> "Service of original process is made by delivering a copy thereof to the person to be served with a copy of the complaint, petition or other initial pleading or paper or by leaving such copies at his usual place of abode with some person of the family over fifteen years of age and informing such person of their contents. Minors who are or have been married shall be served as provided in this section.

In the instant case, no summons or other process for said Third Party Complaint filed by the Trustees against Aerojet has ever been issued by this Court or by the Clerk thereof. [Rule 1.070, Florida Rules of Civil Procedure]. Accordingly, no summons or other process has ever been served upon Aerojet in any fashion, much less in the manner and by the person required by law. [Sections 48.021, 48.031, Florida Statutes]. The mere mailing of a copy of said Third Party Complaint by counsel for the Trustees to Aerojet, care of The Corporation Company, Jacksonville, Florida, wholly fails to constitute sufficient service of said Third Party Complaint or of any required process so as to confer jurisdiction of this Court over the person of Aerojet.

For these reasons alone, among the others hereinabove set forth, the Third Party Complaint should be dismissed and/or the purported service of a copy thereof by mail upon Aerojet's resident agent quashed.

CONCLUSION

For the reasons and based upon the authorities hereinabove set forth, the purported Third Party Complaint filed herein by the Trustees against Aerojet must be dismissed and/or quashed, and this entire mandamus proceeding should be forthwith dismissed.

Repectfully submitted,

MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE
Attorneys for Third Party Respondent, Aerojet-General Corporation
1600 First National Bank Building
Miami, Florida 33131

By /s/ George W. Wright, Jr.

George W. Wright, Jr., and
Karl B. Block, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Third Party Respondent, Aerojet-General Corporation, in Support of Motion to Dismiss and/or Quash Third Party Complaint was mailed this 14th day of July, 1972 to ROBERT L. SHEVIN, ESQ., Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304, M. STEPHEN TURNER, ESQ., General Counsel, Board of Trustees, Elliot Building, Tallahassee, Florida 32304 and STUART L. SIMON, ESQ., County Attorney, Dade County Courthouse, Miami, Florida 33130.

GEORGE W. WRIGHT, JR.
Of Counsel

EXHIBIT "A"

STATE OF FLORIDA
BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND

Elliot Building — Tallahassee, Florida 32304

Joel Kuperberg
Executive Director

Telephone 224-2101

June 26, 1972

Aerojet-General Corporation
c/o The Corporation Company
Thirteenth Floor
Florida Title Building
110 West Forsyth Street
Jacksonville, Florida 32202

State of Florida ex rel
Metropolitan Dade County
vs. Reubin O'D. Askew et
al., vs. Aerojet-General
Corporation - No. 42,461.

Gentlemen:

Pursuant to Rule 3.4b(2)(b), Florida Appellate Rules, you are hereby served with a copy of the attached Third Party Complaint. Written defenses are required to be served within 20 days upon counsel for the Complainants, whose addresses are:

ROBERT L. SHEVIN
Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

M. STEPHEN TURNER
General Counsel
Board of Trustees
Elliot Building
Tallahassee, Florida 32304

Sincerely,

/s/ M. Stephen Turner
M. Stephen Turner
General Counsel

MST:sm
cc: Alan Dimond, Esquire
George W. Wright, Jr., Esquire

EXCERPT OF MEETING OF METROPOLITAN DADE COUNTY COMMISSION ON JUNE 6, 1972

MR. SIMONS: . . . The second thing I would like to report on involves a proposal that has been put forth to this commission by Mr. Dan Paul, and I think he may have discussed this with you several—

MRS. GOLDBERG: I would like to talk on this, if I may.

You are aware of the current situation regarding Aerojet General, which some have termed a "land steal."

There is a possibility that if we filed a suit of—I don't know the legal term—mandamus, I believe it is—

MR. SIMON: It is mandamus.

MRS. GOLDBERG: —in the Supreme Court of Florida pointing out the Statute 253.111, in which before the trustees of the II Board can sell land they must offer it to the County, we might be able to prevent this particular land, in quotes, "steal," as has been said; and as we know, what has happened up to now is that at the present status they are going to be able to buy that land for some $50 an acre, which is an absurd price, and the taxpayers of this State are the ones who are picking up the tab.

We might be able to get it for the County if we involve ourselves in this kind of a suit, and I believe Mr. Simons has the legal reasons on that matter, and I think it is our duty as representatives of the County to assist in any way to see that our taxes are properly protected and—

MR. SIMONS: Madam, I was not being impertinent — (Inaudible.)

MRS. GOLDBERG: —and I would move that the County Attorney be authorized to proceed in the manner he deems best advisable to do this.

(Inaudible.)

VOICE: Second the motion, Mr. Foreman.

MAYOR CLARK: Any objections, folks?

VOICE: (Inaudible.) How do you feel about this?

MR. SIMONS: I am going to be very candid with my County Commission. I am not going to tell you that I have high hopes for success. You might feel—

VOICE: We know you will try hard.

MR. SIMONS: I certainly will.

MRS. GOLDBERG: What have we got to lose? We might get the land at $50 an acre.

MR. SIMONS: I will tell you this: This much I do know about the situation. The option to purchase the land from the II Fund was given in 1961, and Aerojet General then became entitled to purchase this land for $50 an acre.

We have reason to believe that the land is probably worth in the neighborhood of $5,000 an acre.

VOICE: At least.

MR. SIMONS: It was in 1965 that the Legislature passed the act that Mrs. Goldberg told you about. This was four years after the option was granted to Aerojet General.

VOICE: So that's what it goes back to right there.

MR. SIMONS: And this is the reason I think we are going to have trouble. I don't want to say—

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MRS. GOLDBERG: Well, I know we have fought and won some mighty tough battles, but I would like to point out that the time for exercising of the option is after the law was passed, and that law says when the trustees of the II Board are going to sell land, they must first offer it to the public agencies, and I think we should try everything we can to try and—

MAYOR CLARK: Do you have any further reports?

MR. SIMONS: No, Mr. Mayor.

MAYOR CLARK: Mr. Clerk?

VOICE: We could use a vote to cancel tonight's meeting.

MAYOR CLARK: No way. All right. Reverend Graham? Do you have any reports?

REVEREND GRAHAM: Nothing, thank you.

CERTIFICATE OF NOTARY

STATE OF FLORIDA:
: SS.
COUNTY OF DADE :

I, DORIS MAULDIN, do hereby certify that I transcribed the above-styled hearing, and that the foregoing pages, numbered from 1 through 5, inclusive, constitute a true and correct excerpt of the proceedings at said time and place.

/s/ Doris Mauldin

Notary Public State of Florida at Large
My Commission Expires Mar. 21, 1975
General Insurance Underwriters, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the above and foregoing Supplemental Brief and Appendix of Respondent in Opposition to Supplemental Brief of Petitioners was mailed this 23 day of August, 1972 to ROBERT SHEVIN, Attorney General of the State of Florida, Counsel for the Board of Trustees of the Internal Improvement Trust Fund and Counsel for the Board of Education, Petitioners, The Capitol, Tallahassee, Florida and MARION E. SIBLEY, Special Assistant Attorney General, Appointed to Appear for the Petitioners, 605 Lincoln Road, Miami Beach, Florida 33139.

KARL B. BLOCK, JR.

Of Counsel

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